Supreme Court, U.S.
FILED
SEP 5 - 2006
OFFICE OF THE CLERK

No. 06-06-332

In The

Supreme Court of the United States

PHYLLIS BROWN,

Petitioner,

v.

DEKALB COUNTY, GEORGIA

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

PETITION FOR WRIT OF CERTIORARI

DAVID J. BEDERMAN
Counsel of Record
1301 Clifton Road
Atlanta, Georgia 30322-2770
(404) 727-6822

STEVEN K. LEIBEL
GEORGE P. SHINGLER
CASEY GILSON LEIBEL, P.C.
Of Counsel
Six Concourse Parkway
Atlanta, Georgia 30328
(770) 512-0300

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Should this Court's ruling in *McMillian v. Monroe County*, 520 U.S. 781 (1997), be construed as raising a presumption that States exercise effective control over such autonomous officials as county sheriffs, in order to categorize them as "arms of the State" for purposes of determining liability under 42 U.S.C. 1983?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption, except that the defendants below included Sidney Dorsey, Security Investigation Division, Inc., Mecca Security, Inc., Melvin D. Walker, Patrick Cuffy, Paul Skyers and David I. Ramsey. App. 3a. These parties are not relevant for purposes of the current petition.

TABLE OF CONTENTS

Page

Question Presented for Review ..... (i)
List of Parties Below ..... (ii)
Opinions Below 1
Statement of Jurisdiction 1
Constitutional and Statutory Provisions Involved 2
Statement 2

Reasons for Granting the Petition 7

THIS COURT'S REVIEW IS NECESSARY TO CLARIFY THE STATUS, UNDER SECTION 1983, OF LOCAL OFFICIALS' EXERCISING INDEPENDENT AUTHORITY 7

A. Sharp Inconsistencies Have Arisen Concerning the Application of *McMillian* and the Use of Eleventh Amendment "Arm of the State" Precedents in Determining Section 1983 Liability. 12

B. Lower Courts Have Improperly Construed *McMillian* as Precluding Local Officials From Exercising Autonomous Power Independent from Counties and States. 19

Conclusion 24

TABLE OF AUTHORITIES

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 18
Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001) 9, 16
Brown v. Neumann, 188 F.3d 1289 (11th Cir. 1999) 17, 23
Cash v. Granville County Bd. of Educ.,
242 F.3d 219 (4th Cir. 2001) 14, 22
City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 5, 7, 8, 10, 19, 23
Cortez v. County of Los Angeles, 294 F.3d 1186 (9th Cir. 2002) 15
Cozzo v. Tangipahoa Parish Council-President Government,
279 F.3d 273 (5th Cir. 2002) 14
DeGenova v. Sheriff of DuPage County,
209 F.3d 973 (7th Cir. 2002) 15, 21
Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005) 3
Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998) 9, 15, 20, 21, 23
Grayson v. Peed, 195 F.3d 692 (4th Cir. 1999) 8
Grech v. Clayton County, 335 F.3d 1326 (11th Cir. 2003) 18, 20
Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996) 14
Henderson Amusement v. Good,
172 F. Supp.2d 751 (W.D.N.C. 2001) 14
Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997) 15
Hess v. Port Authority Trans-Hudson Corp.,
513 U.S. 30 (1994) 13, 16, 18
Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005) 8, 16, 17
Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) 7, 10, 19
Kennedy v. Widdowson, 804 F. Supp. 737 (D. Md. 1992) 8
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,
440 U.S. 391 (1979) 12, 13
Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003) 8, 9, 18, 20, 22
McMillian v. Monroe County, 520 U.S. 781 (1997) ..... *passim*
Monell v. Dept. of Social Svcs., 436 U.S. 658 (1978) 5, 6, 8
Moy v. County of Cook, 640 N.E.2d 926 (Ill. 1994) 15
Newport v. Fact Concerts, Inc., 453 U.S. 257 (1981) 7
Northern Ins. Co. of N.Y. v. Chatham County,
126 S. Ct. 1689 (2006) 12, 18
Owen v. City of Independence, 445 U.S. 622 (1980) 7

Parker v. Anderson, 519 So. 2d 442 (Ala. 1987) 20
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 4-7, 10
Quern v. Jordan, 440 U.S. 332 (1979) 10
Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997) 13, 14, 18
Scott v. O'Grady, 975 F.2d 366 (7th Cir. 1992) 15
Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001) 15
Venegas v. County of Los Angeles, 87 P.3d 1 (Cal. 2004) 8, 16
Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 10, 13

CONSTITUTIONS AND STATUTES

U.S. Constitution
Eleventh Amendment ..... *passim*

28 U.S.C. § 1257(a) 2
42 U.S.C. § 1983 ..... *passim*

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Phyllis Brown, respectfully prays that a writ of certiorari issue to review the November 14, 2005, judgment and opinion of the Georgia Court of Appeals in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the Georgia Court of Appeals of November 14, 2005, *Brown, et al. v. Dorsey et al.*, is reported at 276 Ga. App. 851, 625 S.E.2d 16 (Ga. Ct. App. 2005) and is reprinted at App. 3-18a. The Supreme Court of Georgia's denial of certiorari was issued on April 25, 2006, and is reprinted at App. 2a. That court's denial of Petitioner's motion for reconsideration was issued on May 19, 2006, and is reprinted at App. 1a.

The Georgia Court of Appeals' opinion was issued in response to an appeal from an order of the Superior Court of Gwinnett County on September 10, 2003, granting the Motion to Dismiss as a Party of DeKalb County, Georgia, reprinted at App. 21-23a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Georgia Court of Appeals of November 14, 2005. The Georgia Supreme Court denied a request for certiorari on April 25, 2006, App. 2a, and a request for reconsideration of that denial was rejected on May 19, 2006. App. 1a. On July 18, 2006, Justice Thomas granted a request for extension of time to file a petition, up to and including September 7, 2006.

The U.S. Supreme Court has jurisdiction to review final judgments rendered by the highest court of a State by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition implicates the Eleventh Amendment to the Constitution of the United States of America. The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. 11.

This petition also involves 42 U.S.C. § 1983, the federal statute which provides for a private legal remedy to secure rights deprived by others under color of law. It is reprinted at App. 24a.

STATEMENT

1. As recounted by the court below, see App. 3a-6a, Derwin Brown was the sheriff-elect of DeKalb County, Georgia, when he was assassinated on December 15, 2000. Elected in August 2000, he was just days away from taking office. He was murdered at the direction of the then-incumbent Sheriff of DeKalb County, Sidney Dorsey, whom Brown had defeated for re-election. App. 4a & n.2.

Derwin Brown's widow, Phyllis Brown, filed an action against the County, former DeKalb County Sheriff Sidney Dorsey, former Sheriff's Department employees Patrick Cuffy and Melvin Walker, and their co-conspirators, Paul Skyers and David Ramsey. App. 3a. Mrs. Brown asserted claims against the County pursuant to 42 U.S.C. § 1983 for wrongful death,

pain and suffering, and special damages resulting from the violation of Brown's First and Fourteenth Amendment rights. Id. Mrs. Brown alleged that the County is liable to her for the death of her husband because Dorsey used the powers of his office to accomplish his murder. App. 4a (citing *Dorsey v. State*, 279 Ga. 534 (615 SE2d 512) (2005) (affirming Dorsey's convictions for malice murder, two counts of violating the Georgia Racketeering and Corrupt Organizations Act ("RICO"), violation of oath by a public officer, and eight counts of theft by taking for using sheriff department resources to pursue his criminal ends)). Specifically, Petitioner "alleged that Dorsey utilized the sheriff's department's resources and manpower to kill her husband; that Dorsey and the other individual defendants committed the murder under color of state law, and that as the sheriff, Dorsey was the final policymaker for the County in matters concerning use of deadly force by sheriff's department personnel, the direction and control of deputies and jailers, and the direction, control, and use of sheriff's department materials, equipment and resources." App. 6a.

2. On January 27, 2003, DeKalb County filed a motion to dismiss it as a party to the action, arguing that this Court has placed strict limitations on local government's liability under 42 U.S.C. § 1983. App. 21a. Following oral argument on the County's motion to dismiss, Mrs. Brown amended her complaint to assert that Dorsey acted, pursuant to his authority as sheriff, "to implement a policy of keeping himself in office by eliminating his competition." App. 6a. On September 10, 2003, the trial court granted the County's motion for the reasons that the Plaintiff, Mrs. Brown, had (1) failed to show that the Sheriff of DeKalb County is a county policymaker and (2) failed to identify either an officially promulgated county policy, or an unofficial custom or practice binding DeKalb County for Defendant Dorsey's actions in the murder of Brown. App. 22a.

The Georgia Court of Appeals denied an application for interlocutory appeal. App. 3a n.1.

On August 6, 2004, Plaintiff filed a motion for Partial Summary Judgment against Defendants Dorsey and Cuffy as to Liability. App. 19a. Noting that evidence establishing that Cuffy and others conspired with Dorsey to murder Derwin Brown was unrebutted, the trial court granted the motion as to those Defendants' liability in their individual capacities. App. 20a. As to liability in their official capacities as former sheriff and sheriff's department employees, however, the trial court noted that "the purpose of bringing suit against any of these individual Defendants in his official capacity is to attempt to establish DeKalb County's liability and to recover from DeKalb County." App. 19a. Accordingly, the trial court denied the motion for summary judgment and flatly stated that "there can be no recovery against DeKalb County." App. 20a.

The case proceeded to trial on damages only against Dorsey, Cuffy, and Skyers. Following a four day jury trial, judgment was entered on the verdict for $326,136,398 in compensatory damages and $450,000,000 in punitive damages. App. 4a.

3. Seeking to recover the compensatory damage award from the County, Mrs. Brown brought an appeal to the Georgia Court of Appeals. App. 3a. On November 14, 2005, that court issued its opinion. See *Brown, et al. v. Dorsey et al.*, 276 Ga. App. 851, 625 S.E.2d 15 (Ga. Ct. App. 2005). App. 3a-18a.

After stating the requirements for a prima facie § 1983 claim, that court reviewed the meaning of "policy" and "custom" before declaring the rule of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), controlling: "municipal liability attaches where – and only where – a deliberate choice to follow a course of action is made among various alternatives

by the official or officials responsible for establishing final policy with respect to the subject matter in question." App. 8a. In affirming the opinion of the trial court, the Georgia Court of Appeals proceeded to answer two questions.

First, the court declined to rule that the Sheriff of DeKalb County "was invested with final policymaking authority sufficient to render the County liable under § 1983 for his evil, ultra vires actions." App. 9a. Noting that "no Georgia appellate court has directly addressed whether the sheriff acts with final policymaking authority for the county or for the state in the context of a § 1983 action," the court proceeded to cite two divided Eleventh Circuit plurality opinions and an off-point Georgia Supreme Court decision to justify its conclusion that the trial court did not err in dismissing the County as a party to Mrs. Brown's action. App. 9-13a.

Specifically, the Georgia Court of Appeals held that "the County has no control over the sheriff's department personnel, including its deputies and jailors. Therefore, the County cannot be held liable under § 1983 for Dorsey's use of those personnel in connection with his heinous plot to kill Derwin Brown." App. 13a. What is more, the Court of Appeals concluded, "[i]n the absence of the ability to control" funds which it allocates to the sheriff, "the County cannot be held liable for the sheriff's use of departmental resources to commit § 1983 violation." Id. In reaching this conclusion, the Georgia Court of Appeals expressly relied on its reading of the controlling federal-law test for section1983 actions, citing and discussing *Monell v. Dept. of Social Svcs.*, 436 U.S. 658 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); and *McMillian v. Monroe County*, 520 U.S. 781 (1997). See App. 4a, 7a, 8a, 12a,13a.

The Georgia Court of Appeals ruled on a second question as well. "[F]or reasons of judicial economy," the court addressed "the trial court's ruling that Mrs. Brown failed to identify either an officially promulgated county policy or an unofficial custom or practice binding the County for Dorsey's actions in the murder of Brown." App. 14a. Reviewing this Court's holdings in *Monell* and *Pembaur*, the court noted the limitations on respondeat superior theories and held forth on the scope of municipal liability under § 1983 for the actions of individual policymakers. App. 14a-18a. Judge Mikell, writing for the Georgia appeals court, first noted his distaste for this Court's holding in *Pembaur* and his preference for the dissent's opinion in that case. App. 15a. Nevertheless, he acknowledged that "*Pembaur* is binding precedent and squarely on point." Id. He then faithfully restated the rule of that decision, and held that "Sheriff Dorsey had final authority to make policy regarding the use of deadly force by his subordinates." App. 16a.

The Georgia appeals court thus affirmed one of the two grounds given by the trial court for granting dismissal of DeKalb County as a party, concluding that while then-Sheriff Dorsey was a final policy-maker for purposes of section 1983 liability, he was acting as a state (and not a county) official. App. 17a-18a. Petitioner obviously takes no issue with the lower court's ruling on section 1983 policy-maker jurisprudence; it is only the holding that Dorsey was a state official which is at stake in this petition.

4. Petitioner next sought review from the Supreme Court of Georgia. App. 2a. That petition was denied on April 25, 2006, over the dissent of two justices. Id. A subsequent Motion for Reconsideration was also denied by a divided Georgia Supreme Court on May 19, 2006. App. 1a. This timely Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

THIS COURT'S REVIEW IS NECESSARY TO CLARIFY THE STATUS, UNDER SECTION 1983, OF LOCAL OFFICIALS' EXERCISING INDEPENDENT AUTHORITY

This petition invites the Court to rectify both the misinterpretation and misapplication of its opinion in *McMillian v. Monroe County*, 520 U.S. 781 (1997). For thirty years this Court has reaffirmed the broad remedy for violations of federal rights that Congress intended when it passed § 1983. See *Monell*, 436 U.S. at 690-91. Indeed, since *Monell* first declared that the governments of state political subdivisions may be held liable for their constitutional torts, this Court's rulings have consistently maintained a rule of municipal liability under § 1983 for "policies and customs" and also for "single, discrete acts" of final policymakers. *Pembaur*, 475 U.S. at 483-84.

Moreover, the Court has "considered several cases involving isolated acts by governmental officials or employees . . .[and has] assumed that an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Praprotnik*, 485 U.S. at 123 (plurality opinion, O'Connor, J.) (citing *Owen v. City of Independence*, 445 U.S. 622, 633, 655 n.39 (1980); *Newport v. Fact Concerts, Inc.*, 453 U.S. 257, 259 (1981); *Pembaur*, 475 U.S. at 480); see also *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 738 (1989). Nothing in *McMillian* changed the fundamental analysis: whether a section 1983 defendant is a state or local

official depends on whether that defendant represented a state or a local government entity when engaged in the events at issue.

In the decade following the *McMillian* decision, however, there has been a sea-change in section 1983 political subdivision liability. Sheriffs, formerly assumed to be county officials, have contested their status as local officials and have frequently succeeded in defeating attempts by plaintiffs to pursue official-capacity claims against them by invoking the Eleventh Amendment and asserting that they are actually state officials for purposes of section 1983 liability. See, e.g., *Grayson v. Peed,* 195 F.3d 692, 697 (4th Cir. 1999) (Virginia sheriffs granted immunity in operation of jails); *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (Georgia sheriffs granted immunity for jail operations); *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005) (Vermont sheriffs granted immunity in cases involving courthouse security and protest permits); *Venegas v. County of Los Angeles*, 87 P.3d 1, 3 (Cal. 2004) (California sheriffs granted immunity when performing law enforcement duties).

Some courts have openly recognized the shifting sands of section 1983 municipal liability before and after *McMilllian.* See *Manders v. Lee*, 338 F.3d at 1328; *Kennedy v. Widdowson*, 804 F. Supp. 737, 741-42 (D. Md. 1992) ("Several federal courts have stated that a sheriff may be considered as a state or local official depending on whether his challenged actions arise out of his traditional law enforcement functions, which are considered statewide in nature.") (citations omitted). But *McMillian* was a continuation of this Court's thirty-years of precedent on county liability under § 1983. It was not intended to change the playing field. *McMillian*, 520 U.S. at 786, 796 (upholding *Monell* and *Praprotnik*).

While *McMillian* mandates an analysis that is both state

and function specific, and, thus, one would anticipate differences in outcomes, judicial application of the various factors in this analysis show no consistency. As a result, in recent section 1983 cases, sheriffs alleged to have violated individuals' federal rights have been variously regarded as state policymakers, see, e.g., *Manders v. Lee*, 338 F.3d at 1328) (sheriff is an arm of the State in establishing use-of-force policy at county jail), county officials, see, e.g., *Brewster v. Shasta County*, 275 F.3d 803, 808 (9th Cir. 2001) (sheriff acts for county when investigating crime and when administering jails), and independent, autonomous officers controlled neither by the state nor the county, see, e.g., *Franklin v. Zaruba*, 150 F.3d 682, 685 (7th Cir. 1998) (holding that if a sheriff is not county agent it does not follow that he is a state agent, but is an independently elected official not subject to the control of the county in most respects).

The only explanation for these deviations seems to be disparity in the relevance and weight which various courts attribute to particular factors and considerations in the section 1983 officer status inquiry. In our federal system, uniform results are certainly not required. As this Court noted in *McMillian*, there is no need for "national characterization" of sheriffs. 520 U.S. at 795. There is, however, a need for a uniform test to be applied by both state and federal courts in resolving the ultimate federal issue of section 1983 liability.

42 U.S.C. § 1983 is an extensively litigated statute, with literally thousands of cases brought each year in an effort to remedy the most egregious violations of federally guaranteed rights. It is for these reasons that this Court, in the wise exercise of its plenary review powers, chose to address the unique, Alabama-specific questions raised by *McMillian*. Id. at 786-94. It is for those reasons that the holding of that case was state specific: "*Alabama* sheriffs, when executing their law

enforcement duties, represent the *State of Alabama*, not their counties." Id. at 794 (emphases added). Most importantly, it is also for these reasons that this Court chose to keep the *Monell/Pembaur* rule intact. See id. at 786. Nowhere did this Court suggest an intent to make a wholesale change in the liability of county sheriffs under § 1983. Nevertheless, that has been the unfortunate and confusing result as courts have read *McMillian* too broadly and reconfigured the limits of section 1983 liability for such autonomous local officials as sheriffs.

This petition raises an even more compelling set of issues than *McMillian* did – not only are courts increasingly divided as to the scope of county liability under § 1983, they are also manifestly unclear about the sources of the state immunity which limits liability for some officials. As noted above, the scope of § 1983 liability for sheriffs depends on the legal superstructures established by state law. See *Pembaur*, 475 U.S. at 483, *Praprotnik*,, 485 U.S. at 118, *Jett*, 491 U.S. at 795; *McMillian*, 520 U.S. at 795) (citing *Pembaur, Praprotnik*, and *Jett*). This in no wise makes this a question solely one of state law, however.

Rather, reference to state law characterizations of various categories of officials has merely been the mechanism by which this Court has recognized that the several States have different infrastructures of law enforcement and other responsibilities of government. Whether a local official is liable under § 1983 is necessarily a federal question. It is a federal question which concerns the statute itself as well as the intent of the legislators who passed it. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68-70 (1989). It is likewise a federal question which implicates the Eleventh Amendment shield of state officials from section 1983 liability. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

So even if this petition raised only the question of whether Georgia sheriffs, in the conduct of their law enforcement activities, were state officials for purposes of section 1983 liability, it would still be worthy of this Court's review. Under a proper application of this Court's analysis in *McMillian*, Georgia county sheriffs in the exercise of their law enforcement and management authority (including policies on the use of deadly force and the allocation of personnel and materiel for law enforcement) would not be regarded as state officials. They would be regarded as county officials or as autonomous officials, but not, in any event, cloaked as "arms of the State" under the Eleventh Amendment. In this respect, the Eleventh Circuit and Georgia courts have misapplied the considerations in *McMillian* to hold that Georgia sheriffs, like those in Alabama, are essentially state executive officers for all purposes.

But, much more significantly, at issue in this case is the general liability of counties for the tortious acts of their final policymakers under section 1983, and the proper scope of the analysis, under *McMillian*, for determining whether ostensibly county officials are acting, instead, for the state. As such, this petition implicates substantive aspects of § 1983 – whether it provides a remedy to those who have had their federal rights violated or neglected by a county official. Especially relevant in light of the flurry of litigation which has redefined and limited municipal liability under § 1983, this petition challenges the propriety of counties and sheriffs escaping responsibility for their tortious acts.

A. Sharp Inconsistencies Have Arisen Concerning the Application of *McMillian* and the Use of Eleventh Amendment "Arm of the State" Precedents in Determining Section 1983 Liability.

As noted above, there are clear splits in the circuits and even among state and federal courts with concurrent jurisdiction over § 1983 as to whether certain classes of local officials (including sheriffs, county marshals and district attorneys) are actually exercising state authority, and are thus immune. This split in authority cannot be reconciled based on divergent state law treatment of these particular offices. Rather, profound disagreements have arisen among the federal courts of appeals and some state appellate courts in the application of this Court's section 1983 and Eleventh Amendment "arm of the State" jurisprudence in identifying state officials. The result has been that some courts, including the one from which review is sought here, have vastly expanded this Court's ruling in *McMillian* and tended to categorically hold that local officials such as sheriffs are state officers.

1. The schisms in application of *McMillian* run along two main axes. The first involves a general tendency to expand section 1983 liability to include local officials, like sheriffs, who also exercise some slice of state authority, despite this Court's admonitions to the contrary. See *Northern Ins. Co. of N.Y. v. Chatham County, Georgia*, 126 S. Ct. 1689, 1693 (2006); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (sovereign immunity does not extend to entities even when they "exercise a 'slice of state power,'" unless they are truly arms of the State). Related to this concern is the extent to which, if at all, the considerations discussed in *McMillian* should be overlaid with this Court's Eleventh Amendment "arm of the State" jurisprudence, including the very specific factors recited in *Regents of Univ. of*

Cal. v. Doe, 519 U.S. 425 (1997), cited in *McMillian*, 520 U.S. at 786, and earlier decisions such as *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994).

This Court has sent mixed signals on the propriety of importing Eleventh Amendment "arm of the State" analysis into section 1983 officer status determinations. In *Will v. Michigan Dep't State Police*, 491 U.S. 58 (1980), this Court noted that: "This does not mean. . . that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are. But in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it." Id. at 66-67. As a consequence of this studied ambiguity, some lower courts have conducted the dual analysis of officer status (under both *McMillian* and Eleventh Amendment "arm of the State" precedents), while others have eschewed it.

This is significant because the considerations enunciated by this Court in *McMillian* for section 1983 officer status are not necessarily congruent with the factors for "arm of the State" analysis. Compare *McMillian*, 520 U.S. at 785-92 (emphasizing state law characterization of sheriff's office and state control over sheriff's activities), with *Hess*, 513 U.S. at 47-51 (degree of financial independence of entity matters more than extent of state control over the entity's activities). And while an entity cannot be regarded as an "arm of the State" if it merely exercises a "slice of state power," see *Lake Country*, 440 U.S. at 401, some courts interpreting *McMillian* have granted immunity to section 1983 actions when a local officer appears to be undertaking an ostensibly state function, irrespective of any other factors.

2. For the broad contours of post-*McMillian* section

1983 officer status, the main lines of fracture are the Fourth, Seventh, and Ninth Circuits on one side of the divide, and the Second and Eleventh Circuits on the other. Each court of appeals' jurisprudence illustrates a different approach to this Court's ruling in *McMillian* and allied Eleventh Amendment "arm of the State" cases. For almost all of these courts, the local official which has most often been implicated in section 1983 cases, and which presents the most anomalous status, has been the county sheriff.

a. In the Fourth Circuit, to take one example – the consideration of the status of North Carolina sheriffs – there have been open questions as to the effect of this Court's case-law on the relevant status inquiry under section 1983. The prevalent law in the Fourth Circuit has been that North Carolina sheriffs are county officers for all purposes. See *Harter v. Vernon*, 101 F.3d 334, 343 (4th Cir. 1996). *Harter* was decided before this Court's ruling in *McMillian*, and some governmental authorities – seeking to disclaim section 1983 liability – argued that its reasoning was abrogated by *McMillian* and by this Court's "arm of the State" decision in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), and some district courts concurred in that analysis. See *Henderson Amusement v. Good*, 172 F. Supp.2d 751, 763 (W.D.N.C. 2001). Nevertheless, the Fourth Circuit held that its ruling in *Harter* was fully consistent with *McMillian* and *Regents*. See *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 221, 227 (4th Cir. 2001). Other federal courts of appeals have aligned with the Fourth Circuit's tack in restrictively applying *McMillian* and this Court's "arm of the State" jurisprudence. See, e.g., *Cozzo v. Tangipahoa Parish Council-President Government*, 279 F.3d 273, 281-83 (5th Cir. 2002) (concluding that Louisiana parish sheriffs are not an arm of the State and not entitled to Eleventh Amendment immunity).

The Seventh Circuit has articulated a much narrower approach in applying this Court's decision in *McMillian*, particularly in reference to the status of sheriffs in Illinois. This approach has tended to entirely discount any "arm of the State" analysis for county officials. In the Seventh Circuit, pre-*McMillian* authority had ruled that Illinois sheriffs were county officials, except when executing judicial writs of assistance. See *Scott v. O'Grady*, 975 F.2d 366, 370-71 (7th Cir. 1992). In *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), that court of appeals held that Illinois sheriffs are not state officers when they exercise their general law enforcement authority, and that such a ruling was consistent with this Court's decision in *McMillian*, a contrary Illinois Supreme Court opinion notwithstanding. See id. at 684-86 (discussing *McMillian* and distinguishing *Moy v. County of Cook*, 640 N.E.2d 926 (Ill. 1994)). This ruling was extended by the Seventh Circuit in *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000), to apply to the conduct of Illinois sheriffs in operating county jails. See id. at 975-77.

The Ninth Circuit case-law follows somewhat the same trajectory as that in the Fourth and Seventh Circuits: both pre- and post-*McMillian* precedents from that court of appeals had confirmed that California sheriffs were local, and not state, officials for virtually all suits under section 1983. See, e.g., *Henry v. County of Shasta*, 132 F.3d 512, 517-23 (9th Cir. 1997) (pre-*McMillian*); *Cortez v. County of Los Angeles*, 294 F.3d 1186 (9th Cir. 2002) (post-*McMillian*). In *Cortez*, the Ninth Circuit affirmed that California sheriffs are county officials in the administration of county jails. See id. at 1188; see also *Streit v. County of Los Angeles*, 236 F.3d 552, 564-65 (9th Cir. 2001). The Ninth Circuit has gone even farther and held that a California sheriff exercising virtually any law enforcement authority (including crime investigation) is acting as a county

official. See *Brewster v. Shasta County*, 275 F.3d 803, 807-08 (9th Cir. 2001), cert. denied, 537 U.S. 814 (2002).

The *Streit*, *Brewster* and *Cortez* decisions have created an irreconcilable conflict with California state courts which have held that county sheriffs are state officials in the conduct of their law enforcement, investigatory, and jail management functions. See *Venegas v. County of Los Angeles*, 87 P.3d 1 (Cal. 2004). In *Venegas*, the California Supreme Court construed *McMillian* as making the section 1983 status question for sheriffs as turning entirely on state law. Id. at 6. The California Supreme Court, over the dissent of three justices, expressly repudiated the Ninth Circuit's holdings in *Brewster*, and also took issue with the proper application of *McMillian* and its relation with this Court's Eleventh Amendment "arm of the State" precedents. See id. at 9-10 (discussing *McMillian*'s respondeat superior analysis and the effect of *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1984)). This conflict in authority means that it is possible today to sue a California sheriff in federal court, under section 1983, while the same suit would be unsustainable in state court.

b. On the other side of the ledger, the Second and Eleventh Circuits have broadly construed *McMillian* and "arm of the State" precedents to sweepingly characterize many local officials (not just sheriffs, but district attorneys as well) as state officers for purposes of section 1983 liability. As for the Second Circuit, in *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005), in holding that Vermont sheriffs were state officers in their management of courthouse security, that court of appeals summarized the relevant factors mentioned in *McMillian*:

> how the state's laws and courts categorize the official; whether the official is elected and by whom; the scope of the official's duties; to

> whom the official is fiscally responsible, if anyone; which governmental entity sets or pays the official's salary; which governmental entity provides the official's equipment, if any; and the scope of the official's jurisdiction. For a law-enforcement official, the most important factor in making this determination is whether he or she has the authority to investigate and enforce the state's criminal law.

Id. at 71 (citing *McMillian*, 520 U.S. at 787-91). The Second Circuit's formulation of the *McMillian* factors was apparently intended to obviate any recourse to this Court's "arm of the State" jurisprudence.

That leaves the Eleventh Circuit, encompassing the jurisdiction at issue in this petition. This court of appeals has managed to broadly construe *McMillian* as immunizing virtually any county official exercising any slice of state authority, while also aggressively deploying this Court's "arm of the State" jurisprudence to confirm outcomes of section 1983 liability. This expansive trend was marked by the Eleventh Circuit's decisions regarding the status of sheriffs in Alabama, Florida and Georgia. The position of Alabama sheriffs was, of course, settled by this Court's 1997 decision in *McMillian*. As for Florida sheriffs, the appeals court – with substantial understatement – observed that "[w]e recognize that our decisions have not been entirely consistent on whether the relevant entity in an official-capacity suit against a sheriff in Florida is the County or the Sheriff's Department (as a unit operating autonomously from the County)." *Brown v. Neumann*, 188 F.3d 1289, 1290 n.2 (11th Cir. 1999).

But it was a series of 6-6 en banc decisions regarding the status of Georgia sheriffs, relied upon by the Georgia court

below, see App. 9a-11a (discussing *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc); and *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), cert. denied, 540 U.S. 1107 (2004)), that established the contours of section 1983 officer status in the Eleventh Circuit. The *Manders* decision expressly employed "arm of the State" idioms to characterize Georgia sheriffs as state officials in cases involving the use of force at county jails. See 338 F.3d at 1309 n.9, 1324-25 (discussing *Hess*, *Regents*, and *Auer v. Robbins*, 519 U.S. 452 (1997)). But in doing so, the plurality in *Manders* privileged the manner in which state law defines an entity or office, emphasized the general characterization of an officer's activities as a state function, and virtually ignored the question of whether the state's fisc would be used to pay a judgment against a county sheriff. Indeed, the Eleventh Circuit held that a state need not be responsible for a judgment in order for an entity to be an arm of the State. Id. at 1328; but see id. at 1331-32 (Anderson, Tjoflat, Birch & Wilson, JJ., dissenting) (disputing this "arm of the State" calculus). The *Manders* decision elaborated on the approach used in *Grech*, which characterized a Georgia sheriff's law enforcement and management activities as a sovereign, state function. See 335 F.3d at 1331-32 & 1347 n.46.

The Eleventh Circuit's refashioning of Eleventh Amendment jurisprudence, especially in regards to counties enjoying some sort of residual "arm of the State" status, has been repudiated by this Court just last Term. See *Northern Ins. Co. of N.Y. v. Chatham County, Georgia*, 126 S. Ct. 1689, 1692-94 (2006), rev'g, *Zurich Ins. Co. v. Chatham County*, No. 04-13308 (Jan. 28, 2005), judgt. order reported at 129 Fed.Appx. 602 (11th Cir. 2005). The Eleventh Circuit's "expansive arm-of-the-State test," 126 S. Ct. at 1693-94, one which tended to discount such factors as whether the state

treasury would be liable for a judgment against a county sheriff, was expressly disavowed by this Court. See id. Likewise, the approach taken by the Eleventh Circuit in *Grech* and *Manders*, and expressly adopted by the Georgia courts, should be rejected here.

B. Lower Courts Have Improperly Construed *McMillian* as Precluding Local Officials From Exercising Autonomous Power Independent from Counties and States.

1. The second broad set of pathologies illustrated by the post-*McMillian* cases has been, contrary to the express admonition of the decision to the contrary, see 520 U.S. at 785, to regard the section 1983 officer status test as an all-or-nothing proposition. While the federal courts of appeals and state appellate courts have been mindful of this Court's concern that a county official may act as a final policymaker under state authority for some purposes, but not for others, there remains another nuance. That is the possibility that some local officials (such as sheriffs), in conducting certain functions, exercise such a high degree of autonomy as not to be directly accountable to county governments, but are not truly state officers, either. In these situations, some federal courts of appeals have ruled that autonomous local officials are not immunized from section 1983 liability.

This Court's opinion in *McMillian* notes that one "guid[ing] . . . principle" of the section 1983 status analysis assesses "whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." Id. at 785 (citing *Jett*, 491 U.S. at 737-38; *Praprotnik*, 485 U.S. at 123). Chief Justice Rehnquist, writing for the Court summarized this analysis in the context of Alabama sheriffs:

"We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity." Id. at 785-86.

2. Some lower courts have construed this language from *McMillian* as raising a presumption that if a local official is not effectively employed or controlled by a county or municipal authority, that officer is definitionally a state officer and immune under section 1983. This was precisely the approach adopted by the Georgia appeals court below. See App. 11a-14a (holding that because county did not exercise authority over sheriff's use of deadly-force policies or law enforcement personnel and resources, the state exercised control over those functions). This analysis was borrowed from Eleventh Circuit precedents, reading *McMillian* to assume that if a local official was not answerable to a county government for a particular function or activity, she was a state officer. See *Grech*, 335 F.3d at 1347; *Manders*, 338 F.3d at 1328.

These Georgia and Eleventh Circuit authorities[1] appear to be in direct conflict with rulings from the Seventh Circuit. In *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), that court of appeals read *McMillian* as rejecting section 1983 liability when a local official was acting, for a particular purpose, as an "'executive officer[] of the state,' such that counties could not be held liable under respondeat superior for the actions of their sheriffs." Id. at 685 (quoting *McMillian*, 520 U.S. at 788 (citing *Parker v. Amerson*, 519 So.2d 442, 444 (Ala.1987)). But that

---

[1] As to the section 1983 liability of Georgia sheriffs, in the performance of their law enforcement activities, all relevant federal and state courts have spoken to the matter. In contrast to the time that this Court reviewed a petition for certiorari in *Mathers*, see 540 U.S. 1107 (2004), there is no need for further percolation of the issue.

did not raise a presumption that an autonomous local official was an "arm of the State" for section 1983 liability. The Seventh Circuit noted in this regard:

> According to the defendant, if sheriffs in Illinois are not agents of the county for purposes of holding the county liable under respondeat superior, then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases – namely, that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects.
>
> . . . .
>
> Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties. Because the Sheriff was not acting as an agent of the state in this case [the Eleventh Amendment was inapplicable and section 1983 liability attached].

Id. at 1685 (citations omitted).

This recognition of a "third way" in section 1983 liability analysis has been reaffirmed by the Seventh Circuit, see *DeGenova*, 209 F.3d at 975 ("The Sheriff also argues that because we have held that Illinois sheriffs are not county employees, by default they must be agents of the State. We rejected this argument in *Franklin*, and do so again today."),

and other federal appeals courts. See *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 226-27 (4th Cir. 2001) (North Carolina county school boards as autonomous bodies). Indeed, dissenting judges in the Eleventh Circuit opinions, discussed above, raised precisely the same point. See *Manders*, 338 F.3d at 1331-32 ("the proper question is whether the sheriff has carried his burden of proving that he is an arm of the state. . . . [t]he issue is not the state versus the county; rather, the issue is whether the sheriff is an arm of the state *vel non*. The mere fact that the sheriff is not the policymaker for the county commission, is not controlled by the county commission, and the fact that the county has no respondeat superior liability for judgments against the sheriff, do not, either singly or in combination, go very far toward establishing that a Georgia sheriff is an arm of the state. The Seventh Circuit recognized this in *Franklin v. Zaruba*. . . .") (Anderson, Tjoflat, Birch, Wilson, JJ., dissenting).

3. Petitioner submits that this Court's section 1983 officer status jurisprudence (including *McMillian*), as well as its "arm of the State" precedents, are fully consistent with the notion that certain local officials, exercising certain categories of functions, are autonomous of county government control but are not state officers for purposes of immunizing their conduct under section 1983 and the Eleventh Amendment. To disavow the existence of local officials independent of both county and state authority would be to refuse to recognize the diversity of local government organization in many states in this country, a result expressly disavowed by the *McMillian* decision itself. See 520 U.S. at 795. Any other outcome would also turn both this Court's section 1983 and "arm of the State" precedents on their head and lead to the result that, where the status of an official is ambiguous under the relevant state law, she will be presumed immune from suit for federal constitutional

violations.

Georgia sheriffs, as final policymakers on the use of deadly force and the allocation of law enforcement assets in their counties (as the court below correctly held, see App. 14a-18a), are not arms of the State. This result can be reached either through a proper analysis of the calculus of factors and considerations in *McMillian* or, at a minimum, by a recognition that certain local officials (such as sheriffs) while not properly assimilable to county government are, nonetheless, not officers of the state. Whether the proper defendant in this case is DeKalb County, Georgia, or the Sheriff's Office of DeKalb County, is of no moment. See *Brown*, 188 F.3d at 1290 n.2; *Franklin*, 150 F.3d at 685 (allowing substitution of county government with sheriff's department, or vice versa, depending on the section 1983 liability analysis of the responsible party).

The important question is whether autonomous local officials should be suffered to exploit the ambiguities of their status in order to thwart the application of federal law and section 1983 liability. In *McMillian*, this Court warned of just such a gambit by local officials. 520 U.S. at 796 ("The final concern of petitioner and his *amici* is that state and local governments will manipulate the titles of local officials in a blatant effort to shield the local governments from liability. But such efforts are already foreclosed by our decision in *Praprotnik*.") (citing and quoting 485 U.S. at 127). While petitioner by no means suggests that Georgia has crudely or cynically "manipulate[d] the titles of local officials," id., a larger matter is at stake in this petition: the general coherence of this Court's section 1983 liability and "arm of the State" jurisprudence as applied to local officials.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record[2]
1301 Clifton Road
Atlanta, Georgia 30322-2770
(404) 727-6822

STEVEN K. LEIBEL
GEORGE P. SHINGLER
Casey Gilson Leibel, P.C.
Of Counsel
Six Concourse Parkway
Atlanta, Georgia 30328
(770) 512-0300

September 5, 2006

---

[2] Counsel acknowledges the assistance of the following Emory Law School student in the preparation of this Petition: John E. Wierwille.

Appendix

SUPREME COURT OF GEORGIA

Case No. S06C0780 Atlanta, May 19, 2006

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PHYLLIS BROWN et al. v. DEKALB COUNTY et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Sears, C.J., and Melton, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and seal of said court hereto affixed the day and year last above written.

//s_____

Sherie M. Welch, Clerk

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: APRIL 25, 2006

Steven Keith Leibel
CASEY GILSON LEIBEL P.C.
Suite 2200
Six Concourse Parkway
Atlanta, GA 30328

Case No. S06C0780

PHYLLIS BROWN et al. v. DEKALB COUNTY et al.

COURT OF APPEALS CASE NO. A05A1129

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Sears, C.J., and Melton, J., who dissent.

_____

_____

_____

_____

Sherie M. Welch, Clerk

FIRST DIVISION
ANDREWS, P.J.,
PHIPPS and MIKELL, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, Sept. 5, 2002) http://www.gaappeals.us/rules

November 14, 2005

In the Court of Appeals of Georgia

A05A1129. BROWN et al. v. DORSEY et al.

MIKELL, Judge.

Phyllis Brown, widow of murdered DeKalb County, Georgia, Sheriff-elect Derwin Brown, filed an action against the County, former DeKalb County Sheriff Sidney Dorsey, former deputies Patrick Cuffy and Melvin Walker, and their co-conspirators, Paul Skyers and David Ramsey. Mrs. Brown asserted claims against the County pursuant to 42 USC § 1983 for wrongful death, pain and suffering, and special damages resulting from the violation of Brown's First and Fourteenth Amendment rights. The superior court granted the County's motion to dismiss it as a party to this action.[1] The case

[1] We denied Mrs. Brown's application for interlocutory appeal on October 29, 2003. After discovery, Mrs. Brown moved for summary judgment on her § 1983 and state law (continued...)

proceeded to trial on damages only against Dorsey, Cuffy, and Skyers. After a four-day jury trial, judgment was entered on the verdict for $326,136,398 in compensatory damages and $450,000,000 in punitive damages. Mrs. Brown seeks to recover the compensatory damage award from the County. Specifically, she contends that the County is liable to her for the death of her husband because Dorsey used the powers of his office to accomplish the murder.[2] She also alleges that Dorsey was a final policymaker for the County concerning the operation of the sheriff's office. The County moved for dismissal on the basis that the United States Supreme Court has placed strict limitations on local government liability under 42 USC § 1983.[3]

[1](...continued)
claims against Dorsey and Cuffy. The trial court denied the motion in part, ruling that those defendants could not be held liable in their official capacity because the County, in turn, could not be held liable for their actions. However, the court granted the motions as to Dorsey's and Cuffy's liability in their individual capacities, ruling that the unrebutted evidence showed that they conspired with others to murder Brown.

[2] Dorsey's convictions of malice murder, two counts of violating the Georgia Racketeering Influenced and Corrupt Organizations Act ("RICO"), violation of oath by a public officer, and eight counts of theft by taking were affirmed in *Dorsey v. State*, 279 Ga. 534 (615 SE2d 512) (2005).

[3] See *Monell v. Dept. of Social Svcs.*, 436 U.S. 658, 690-691 (98 SC 2018, 56 LE2d 611) (1978) (local governments cannot be held liable under § 1983 based on a respondeat superior theory). See generally, Koehn, *The New American*
(continued...)

The trial court granted the motion for the reasons that Mrs. Brown (1) failed to show that the Sheriff of DeKalb County is a county policymaker and (2) failed to identify either an officially promulgated county policy or an unofficial custom or practice binding the County for Dorsey's actions in the murder of Brown. Although we do not agree with all that is said in the trial court's order, we affirm the judgment.

"A motion to dismiss may be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under and state of facts that could be proven in support of her claim."[4] "In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor."[5] We apply a de novo standard of review to the trial court's ruling on a motion to dismiss.[6]

[3](...continued)
Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs, 32 U. Mich. J.L. Reform 49 (1998) (arguing that the Supreme Court decreased the scope of § 1983 in the two decades prior to 1998).

[4] (Citation and punctuation omitted.). *Ga. Military College v. Santamorena*, 237 Ga. App. 58 (514 SE2d 82) (1999).

[5] (Footnote omitted.) *Anderson v. Flake*, 267 Ga. 498, 501 (2) (480 SE2d 10) (1997).

[6] *Common Cause/Ga. v. Campbell*, 268 Ga. App. 599, (continued...)

In her complaint, Mrs. Brown alleges that Dorsey utilized the sheriff's department's resources and manpower to kill her husband; that Dorsey and the other individual defendants committed the murder under color of state law, and that as the sheriff, Dorsey was the final policymaker for the County in matters concerning use of deadly force by sheriff's department personnel, the direction and control of deputies and jailers, and the direction, control, and use of sheriff's department materials, equipment and resources. Following oral argument on the County's motion to dismiss, Mrs. Brown amended her complaint to assert that Dorsey acted, pursuant to his authority as sheriff, "to implement a policy of keeping himself in office by eliminating his competition." Accordingly, she contends that the County is liable for Dorsey's actions.

In order to state a claim against the County under 42 USC § 1983, Mrs. Brown must allege that a County policymaker's acts or omissions, done under color of state law, resulted in the deprivation of a right, privilege, or immunity protected by the United States Constitution or the laws of the United States.[7] In other words, the plaintiff must show a deprivation of a "federal right by a person acting under color of state law."[8] Municipalities and other local government entities

[6](...continued)
601 (2) (602 SE2d 333) (2004)

[7] See *Epps v. Gwinnett County*, 231 Ga. App. 664, 668-669 (7) (a) (499 SE2d 657) (1998).

[8] (Citation omitted.) *Griffin v. City of Opa-Licka*, 261 F3d 1295, 1303 (B) (1) (11th Cir. 2001).

are included among those persons to whom § 1983 applies.[9] Municipalities and other local government entities, however, may not be held liable on a respondeat superior theory; instead, it is only when the execution of its policy or custom inflicts the subject injury that liability can attach to the entity under § 1983.[10] To make this showing, a plaintiff must prove that, through a deliberate and official policy, the local government entity was the moving force behind the constitutional tort.[11] "A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality.[12] A custom is a practice that is so settled and permanent that it takes on the force of law.[13] As succinctly stated by the late United States Supreme Court Chief Justice Rehnquist, "[i]f the sheriff's actions

[9] *Monell*, supra 436 U.S. at 690-91 (II). Commentators on this area of law use the term "municipal liability" whether the entity being sued is a county, city, town or other form of local government.

[10] *Board of County Commrs. v. Brown*, 520 U.S. 397, 403 (II), (117 SC 1382, 137 LE2d 626) (1997); *Monell*, supra 436 U.S. at 694 (II).

[11] *Brown*, supra 520 U.S. at 403-404 (II).

[12] (Citation omitted.) *Sewell v. Town of Lake Hamilton*, 117 F3d 488, 489 (11th Cir. 1997).

[13] *Monell*, supra 436 U.S. at 691 (II).

constitute county 'policy,' then the county is liable for them."[14]

The United States Supreme Court has held that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."[15] However, "municipal liability under § 1983 attaches where– and only where– a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[16] Moreover, "[e]ven though a single decision by municipal policymakers . . . may be sufficient to establish that a municipal policy or custom caused the alleged deprivation, liability may not be imposed pursuant to 43 USC § 1983 for a single incident of unconstitutional conduct . . . without proof that the conduct was taken pursuant to a municipal policy or custom."[17]

[14] *McMillian v. Monroe County*, 520 U.S. 781, 783 (117 SC 1734, 138 LE2d 1) (1997), citing *Monell*, supra 436 U.S. at 694 (II). *McMillian* affirmed a dismissal of § 1983 claims against an Alabama county on the ground that its sheriff was a policymaker for the state and not for the county. For an analysis of *McMillian* and its effects, see generally Fitzpatrick, *Limiting Municipal Liability in Section 1983 Litigation: McMillian v. Monroe County, Alabama*, 35 Hous. L. Rev. 1357 (1998).

[15] *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (II) (A) (106 SC 1292, 89 LE2d 452) (1986).

[16] (Citation omitted.) Id. At 483-484 (II) (B).

[17] *Means v. City of Atlanta Police Dept.*, 262 Ga. App

(continued...)

1. Mrs. Brown would have us rule that Dorsey, as Sheriff of DeKalb County, was invested with final policymaking authority sufficient to render the County liable under § 1983 for his evil, ultra vires actions.[18] We decline to make that ruling.

No Georgia appellate court has squarely addressed the issue of whether the sheriff acts with final policymaking authority for the county or for the state in the context of a § 1983 action. However, in *Grech v. Clayton County*[19] an exhaustive 6-6 plurality opinion, the Eleventh Circuit Court of Appeals held that although Ga. Const. of 1983, Art. IX, Sec I,

[17](...continued)
700, 705, (2), n. 3 (586 SE2d 373) (2003), citing *Pembaur*, supra 475 U.S. at 478-482. See also *Outlaw v. Nasworthy*, 250 Ga. App. 362, 365 (3) (551 SE2d 785) (2001) (evidence did not show any official policy or custom of ignoring citizen complaints); *Bell v. City of Albany*, 210 Ga. App. 371, 373 (436 SE2d 87) (1993) (no evidence of custom or policy of using excessive force against arrestees). See also *City of Cave Spring v. Mason*, 252 Ga. 3, 4 (310 SE2d 892) (1984) (§ 1983 "create[s] a cause of action, cognizable by the courts of this state, based upon acts which are in implementation of an *intentional* policy, adopted or ratified by the governing body of a public agency" (emphasis in original).

[18] See generally *Grech v. Clayton County*, 335 F3d 1326, 1342 (III) (i), n. 32 (11th Cir. 2003) (en banc) ("[t]here is not a single Georgia case [in a § 1983 action] . . . holding a *county* liable for the torts of a sheriff or his deputies" (emphasis in original).

[19] Id.

Par. III (a) - (b) designates the sheriff as a "county officer," the same paragraph grants the legislature the exclusive authority to establish a sheriff's powers, duties, qualifications, and minimum salary.[20] The court also noted that in interpreting this constitutional provision, the Georgia Supreme Court has stated that "[t]he sheriff is an elected, constitutional officer; he is subject to the charge of the General Assembly and is not an employee of the county commission."[21] Based on these findings, and noting that "local governments such as counties can never be liable under § 1983 for the acts of those officials whom the local government has no authority to control,"[22] the Eleventh Circuit held that Clayton County, could not be held liable under 42 USC § 1983 for the sheriff's improper maintenance of the Criminal Justice Information System network because the county had no control over the sheriff's performance of this function.[23] As the appeals court presciently

[20] Id. At 1332 (III) (A). A sheriff's statutory duties are defined in OCGA § 15-16-10.

[21] (Citations and punctuation omitted.) Id. At 1333, citing Bd. of Commrs. of Randolph County v. Wilson, 260 Ga. 482 (396 SE2d 903) (1990).

[22] (Citation, punctuation and emphasis omitted.) *Grech*, supra at 1331 (II) (B).

[23] Id. At 1348 (V) (A). Shortly after issuing *Grech*, the same 6-6 plurality of judges held in *Manders v. Lee*, 338 F3d 1304, 1305-1306 (11th Cir. 2003) (en banc) that the sheriff of Clinch County, Georgia, functioned as a policymaker for the state in establishing policies concerning use of force at the jail

(continued...)

noted, "[t]he counties' lack of authority and control over sheriffs explains why counties have no § 1983 liability for their conduct. For example, if a rogue sheriff adopted an unconstitutional law enforcement policy or practice, the county has no authority to prevent or alter it and, in turn, incurs no § 1983 liability for it.[24]

Although *Grech* is not binding precedent, we find its reasoning very persuasive. Moreover, the Georgia Supreme Court has recently reaffirmed that "[t]he sheriff is an elected constitutional county officer and not an employee of the county commission."[25] The sheriff's duties include those that "necessarily appertain to his office, such as the power to make arrests, to maintain the peace, and to enforce the law."[26] Although the county commission sets the sheriff's budget, the commissioners "may not dictate to the sheriff how that budget

[23](...continued)
an in training and disciplining his deputies in that regard. Thus, the sheriff was entitled to Eleventh Amendment immunity from a § 1983 suit brought by an inmate who alleged excessive use of force; the county was not party to the appeal.

[24] *Grech*, supra at 1347 (V) (A).

[25] *Bd of Commrs of Dougherty County v. Saba*, 278 Ga 176, 177 (1) (598 SE2d 437) (2004), citing *Wilson*, supra. Accord *Mayo v. Fulton County*, 220 Ga. App. 825 (1) (470 SE2d 258) (1996).

[26] (Punctuation omitted). *Chaffin v. Calhoun*, 262 Ga. 202, 203 (415 SE2d 906) (1992), citing OCGA § 15-16-10 (a) (8) and *Wolfe v. Huff*, 232 Ga. 44, 45 (205 SE2d 254) (1974).

will be spent in the exercise of his duties."[27] In addition, deputy sheriffs are deemed employees of the sheriff, not the county, and the county cannot be held vicariously liable for the negligence of sheriff's deputies.[28] The sheriff alone has the power to hire and fire his deputies and sheriffs.[29] Further, only the Governor is authorized to suspend a Georgia sheriff.[30] We therefore conclude, as did the Eleventh Circuit in *Grech*, that the Constitution has made the sheriff independent from the County, notwithstanding the designation of the sheriff as a "county officer."[31]

Nevertheless, the question of whether the sheriff has final policymaking authority for the County for § 1983 purposes must be examined in light of the particular function at issue.[32]

[27] *Chaffin*, supra.

[28] *Lowe v. Jones County*, 231 Ga. App. 372, 373 (2) (499 SE2d 348) (1998). Accord *Brown v. Jackson*, 221 Ga. App. 200, 201 (2) (470 SE2d 786) (1996); *Wayne County v. Herrin*, 210 Ga. App. 747, 751 (3) (437 SE2d 793) (1993).

[29] OCGA § 15-16-23.

[30] OCGA § 15-16-26 (c).

[31] See generally, *Warren v. Walton*, 231 Ga. 495, 498-500 (1) (202 SE2d 405) (1973) (sheriff's office is exempt from Home Rule, currently Ga. Const. of 1983, Art. IX, Sec. II, Par. I (c)).

[32] *McMillian*, supra 520 U.S. at 785 (whether sheriff acts

(continued...)

We thus reexamine the allegations in the complaint. Mrs. Brown asserts that Dorsey was the final policymaker for the county in matters concerning the use of deadly force by sheriff's department personnel, the direction and control of deputies and jailors, and the direction, control, and use of sheriff's department materials, equipment and resources. But, as noted above, the County has no control over the sheriff's department personnel, including its deputies and jailors. Therefore, the County cannot be held liable under § 1983 for Dorsey's use of those personnel in connection with his heinous plot to kill Derwin Brown. Finally, even though the County commission approves the sheriff's budget,[33] and the sheriff has the duty to preserve county property from injury or waste,[34] the county cannot control how the sheriff spends the budget.[35] In the absence of the ability to control the funds after they have been allocated, the County cannot be held liable for the sheriff's use of departmental resources to commit a § 1983 violation. It follows that the trial court did not err in dismissing the County as a party to Mrs. Brown's action for the reason that Dorsey was

[32](...continued)
for county or state is not an "all or nothing" proposition). See generally *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (108 SC 915, 99 LE2d 107) (1988) (plurality opinion) ("the challenged action must have been taken pursuant to a policy adopted by the official or officials under state law for making policy in that area") ((citations and emphasis omitted).

[33] *Wilson*, supra at 483 (1).

[34]OCGA § 36-9-8. See *Dorsey v. State*, supra at 537 (1).

[35] *Wilson*, supra.

not a final policymaker for the County when he used departmental personnel and resources to kill her husband.

2. Although not specifically enumerated as error, we address for reasons of judicial economy the trial court's ruling that Mrs. Brown failed to identify either an officially promulgated county policy or an unofficial custom or practice binding the County for Dorsey's actions in the murder of Brown.

In *Monell*, the United States Supreme Court held that local governments may be held liable for unconstitutional actions of their employees under § 1983 if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[36] But a municipality cannot be held liable solely because it employs a tortfeasor. In other words, there is no respondeat superior liability under § 1983; rather, a plaintiff must point to some official policy or custom which resulted in the injury."[37] Mrs. Brown has alleged in her amended complaint that the officially adopted and promulgated County policy, pursuant to which Dorsey's unconstitutional acts occurred, was his policy of maintaining himself in office by eliminating his competition. If we were writing on a blank slate, we would hold that one ad hoc decision does not equal a policy, because a policy by definition is a rule applicable to all similar situations, i.e., "a governing principle

[36] *Monell*, supra 436 U.S. at 690 (II).

[37] (Punctuation omitted.) *Carter v. Glenn*, 243 Ga. App. 544, 545 (1) (553 SE2d 109) (2000), citing *Watson v. Mayor &c of Savannah*, 223 Ga. App. 399, 401 (1) (477 SE2d 667) (1996).

or plan."[38] To be sure, a single application of an unconstitutional policy can result in liability for the local government that adopted the policy. But allowing proof of one discrete illegal act, in this instance murder, to equal proof that the government has a policy of doing such illegal acts is to eviscerate the rule in *Monell* that liability attaches to the government only when the act affecting the injury is done pursuant to a policy.[39]

We agree with the dissent in *Pembaur v. City of Cincinnati* that the majority's reasoning in that decision is circular.[40] *Pembaur* seems to hold that policy is what policymakers make and that policymakers are those who have the authority to make policy; therefore, any decision made by a policymaker is a policy.[41] In the case at bar, Mrs. Brown argues

[38] (Punctuation omitted). *Pembaur*, supra 475 U.S. at 500 (Powell, J., dissenting), quoting Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979).

[39] See, e.g., *McDowell v. Brown*, 392 F3d 1283, 1290 (III) (11th Cir. 2004) (a policy or custom is a "persistent or widespread practice," not an isolated incident), citing *Depew v. City of St. Mary's*, 787 F2d 1496, 1499 (II), (11th Cir. 1986) (random acts or isolated incidents normally are insufficient to establish a custom or policy).

[40] *Pembaur*, supra 475 U.S. at 498 (A) (Powell, J., dissenting).

[41] Id. See generally Beerman, Municipal Responsibility for Constitutional Torts, 48 DePaul L.Rev. 627, 659 (1999)

(continued...)

that Dorsey was a policymaker for the County and, therefore, his ad hoc decision to murder his rival was a policy of the County.

We would reject Mrs. Brown's assertion and affirm on this ground the trial court's dismissal of the claims against the County, but *Pembaur* is binding precedent and is squarely on point. In *Pembaur*, the United States Supreme Court granted certiorari to review a decision by the Sixth Circuit Court of Appeals, which had affirmed the dismissal of § 1983 claims against an Ohio county on the explicit grounds that the plaintiff had "failed to establish, however, anything more than that, on this one occasion, the . . . Sheriff decided to force entry into his [the plaintiff's] office. . . . That single, discrete decision is insufficient, by itself, to establish that the . . . Sheriff . . . [was] implementing a governmental policy."[42] In an opinion written by Justice Brennan, the Court reversed that portion of the Sixth Circuit's decision and held that a single decision can impose § 1983 liability on a local government when the decision is made by "the official or officials responsible for establishing final policy with respect to the subject matter in question."[43]

Because Sheriff Dorsey had final authority to make policy regarding the use of deadly force by his subordinates, we

[41](...continued)
(noting "fundamental disagreement within the [Supreme] Court over what it means for an official to make policy").

[42] (Emphasis in the original) *Pembaur*, supra 475 U.S. at 4760477, citing *Pembaur v. City of Cincinnati*, 746 F2d 337, 342 (III) (6th Cir. 1984).

[43] *Pembaur*, supra 475 U.S. at 483 (II) (B).

are prevented by *Pembaur* from affirming the dismissal on the ground that Dorsey's decision to murder Brown was one discrete decision and not a policy. As argued by the dissent in *Pembaur*, that controlling federal precedent in effect imposes respondeat superior liability on local governments for the intentional acts of "a certain category of employees, *i.e.*, those with final authority to make policy."[44]

If Dorsey had had the final authority to make policy on behalf of the County, then the pleadings filed by Mrs. Brown, including the amended complaint, would be sufficient to withstand a motion to dismiss brought by the County.[45] However, as explained in Division 1 infra, Dorsey was a policymaker for the state and not for the County with regard to

[44] (Citations omitted; emphasis in original.) Id. at 499 (II) (A).

[45] See, e.g., *Beedle v. Wilson*, 422 F3d 1059, 1068 (II) (A) (3) (10th Cir. 2005) (allegations in complaint that hospital's decision to sue plaintiff for libel constituted an official policy or custom sufficient to state a claim against hospital for violating her First Amendment rights); *Wilson v. Civil Town of Clayton*, 839 F2d 375, 382 (II) (B) (7th Cir. 1988) (allegations in complaint that town trustees conspired to have plaintiff's landlord evict him from his business property were sufficient to allege official policy and impose § 1983 liability on town). *Compare Wilson v. City of Boston*, 421 F3d 45, 59 (1st Cir. 2005) ("An unconstitutional policy may be inferred from a single decision or act but the isolated action must be taken by a municipal official with 'final policy-making authority' in the relevant area of the city's business") (citation and punctuation omitted).

the particular functions at issue. For that reason, the trial court properly dismissed the claims against the County.[46]

Judgment affirmed. Andrews, P.J. and Phipps, J., concur.

---

[46] A judgment right for any reason will be affirmed. *South Carolina Ins. Co. v. Glennville Bank*, 111 Ga. App. 174, 179 (2) (b) (141 SE2d 168) (1965).

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

PHYLLIS BROWN,
Plaintiff,

vs.

SIDNEY DORSEY, SECURITY INVESTIGATION DIVISION, INC., MECCA SECURITY, INC., MELVIN D. WALKER, PATRICK CUFFY, PAUL SKYERS, and DAVID I. RAMSEY
Defendants

CIVIL ACTION FILE NO. 02-A-12722-7

ORDER

Plaintiff filed her Motion for Partial Summary Judgment against Defendants Dorsey and Cuffy as to Liability on August 6, 2004. There was no response filed in opposition. After consideration of the Motion, evidence, all matters of record, and the applicable and controlling law, the Court finds as follows:

On September 11, 2003, this Court dismissed DeKalb County as a party Defendant from the above referenced civil action file based on Plaintiff's failure to allege a valid § 1983 action against DeKalb County. The purpose of bringing suit against any of these individual Defendants in his official capacity is to attempt to establish DeKalb County's liability and to recover from DeKalb County. The Court has already ruled on

the issue, and there can be no recovery against DeKalb County. Therefore, Plaintiff's motion is **HEREBY DENIED** as to Counts IV-VII.

The unrebutted evidence does, however, establish that Cuffy and others conspired with Dorsey to murder Derwin Brown. There are no remaining issues of material fact as to these Defendant's liability in their individual capacities. As such, Plaintiff's motion is **HEREBY GRANTED** against Defendants Dorsey and Cuffy in their individual capacities as to Counts I-II and VIII.

The parties will receive notice when the case is placed on the Court's default calendar to prove damages against Defendants Dorsey and Cuffy individually.

SO ORDERED, this /22d/ day of September 2004.

/s/

MELODIE SNELL CONNER, Judge
Superior Court of Gwinnett County

cc: Steven Leibel
Albert Mitchell
Brian Steel
Duane Jones

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

PHYLLIS BROWN,
Plaintiff,

vs.

SIDNEY DORSEY, SECURITY INVESTIGATION DIVISION, INC., MECCA SECURITY, INC., MELVIN D. WALKER, PATRICK CUFFY, PAUL SKYERS, DAVID I. RAMSEY, and DEKALB COUNTY,
Defendants.

CIVIL ACTION FILE NO. 02-A-12722-7

ORDER

Defendant DeKalb County filed its Motion to Dismiss on January 27, 2003. Plaintiff responded in opposition on March 3, 2003. DeKalb County filed a reply brief on March 18, 2003 to which Plaintiff responded on April 2, 2003. Upon requests of the parties, the matter was set down for oral argument. DeKalb County filed its supplemental brief and second supplemental brief on July 23, 2003 and July 30, 2003 respectively.

The motion came before the Court for a hearing on August 6, 2003. Plaintiff, her counsel, and counsel for DeKalb County were present. Upon request of the parties, the Court allowed the parties additional time to file supplemental briefs subsequent to the hearing. Plaintiff filed her supplemental brief and amended complaint on August 13, 2003. The Court is not taking into consideration the exhibits attached to Plaintiff's August 13, 2003 supplemental brief; therefore, the motion is not converted to one for summary judgment. DeKalb County filed its reply brief on August 22, 2003. After consideration of the Motion, the response thereto, argument, all other matters of record, and the applicable and controlling law, the Court finds as follows:

Construing the pleadings in a light most favorable to the Plaintiff, the Plaintiff has failed to show that the Sheriff of DeKalb County is a county policymaker. Further, Plaintiff has failed to identify either (1) an officially promulgated county policy, or (2) an unofficial custom or practice binding DeKalb County for Defendant Dorsey's actions in the murder of Derwin Brown. *See* Grech v. Clayton County, Georgia, 2003 WL 21521761 (11th Cir.) and Manders v. Lee et al., 2003 WL 21729838 (11th Cir.) Therefore, Plaintiff has failed to allege a valid § 1983 claim against Defendant DeKalb County.

For the foregoing reasons, Defendant DeKalb County's Motion to Dismiss is **HEREBY GRANTED**, and DeKalb County is **HEREBY DISMISSED** as a part to the above-styled civil action.

SO ORDERED, this /10th/ day of September, 2003.

/s/

MELODIE SNELL CONNER, Judge
Superior Court of Gwinnett County

cc: Steven Leibel
Xernia Fortson
Albert Mitchell
Brian Steel
Duane Jones

42 U.S.C.A. § 1983

42 U.S.C.A. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction therof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

No. 06-332

FILED

OCT 10 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

PHYLLIS BROWN,

Petitioner,

v.

DEKALB COUNTY, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. LINKOUS*
County Attorney

SAM L. BRANNEN, JR.
Senior Assistant County Attorney

**Counsel of Record*

DUANE D. PRITCHETT
Chief Assistant County Attorney

MELANIE F. WILSON
Senior Assistant County Attorney

DEKALB COUNTY LAW DEPARTMENT
1300 Commerce Drive, 5th Floor
Decatur, Georgia 30030
(404) 371-3011
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONSE TO PETITIONER'S QUESTION PRESENTED FOR REVIEW

Petitioner's statement of the question presented misconstrues this Court's precedent, including *McMillian v. Monroe County, Alabama* because the "arm of the state" analysis applied to determine Eleventh Amendment immunity is not relevant here. A more appropriate statement of the question presented for review is whether the Georgia Court of Appeals properly applied the final policymaker analysis of *Monell v. New York City Dept. of Social Servs.* and *McMillian v. Monroe County, et al.* when, after weighing competing factors, it concluded that in this case former sheriff Sidney Dorsey was not a policymaker for DeKalb County for purposes of liability under 42 U.S.C. § 1983.

RESPONSE TO THE PETITIONER'S STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, Respondent points to an implicit misstatement of fact that arises from the trial court's order on a motion for partial summary judgment as to the former sheriff Sidney Dorsey and co-defendant, Patrick Cuffy, a former employee of the sheriff's office.[1] It appears that the trial court was confused about whether the suit was brought against the former sheriff in his official capacity. The Complaint and Amended Complaint filed in this action do not, however, contain any official capacity claims against the former sheriff, the alleged final policymaker.[2]

---

[1] Petitioner's Appendix 19a.

[2] *See* Respondent's Appendix 1-29.

TABLE OF CONTENTS

Page

Response to Petitioner's Question Presented for Review i

Response to Petitioner's Statement of the Case ii

Reasons for Denying the Petition 1

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT 3

I. The Georgia Court of Appeals' decision adheres to this Court's § 1983 jurisprudence and, therefore, this Court's review is not warranted 3

II. The Circuit Courts of Appeals' decisions discussed by the Petition as indicative of a split between the circuits are irrelevant to this case. The "sea" of § 1983 jurisprudence remains unchanged 4

A. In *McMillian* this Court anticipated that there would not be a uniform national characterization for all sheriffs 5

B. The Eleventh Circuit Court of Appeals correctly applied *McMillian* 6

C. An overwhelming majority of the decisions described as indicative of a split between the Circuit Courts of Appeal address Eleventh Amendment immunity and are irrelevant to the case at bar 8

III. Under Georgia law former sheriff Dorsey was a policymaker for the State of Georgia for the functions at issue. The hypothetical possibility that local officials may exercise autonomous power independent from counties and States is of no consequence under the facts of this case 12

TABLE OF CONTENTS – Continued

Page

A. This case does not involve Eleventh Amendment immunity..... 13

B. The Georgia Court of Appeals correctly found that former sheriff Dorsey was not a policymaker for the County for the functions at issue..... 14

Conclusion..... 20

TABLE OF AUTHORITIES

Page

CASES

Bd. of Commrs. of Dougherty County v. Saba, 278 Ga. 176 (2004) 18

Bd. of Commrs. of Randolph County v. Wilson, 260 Ga. 482 (2004) 18

Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001) 10

Brown v. Jackson, 221 Ga. App. 200 (1996) 18

Cash v. Granville County Bd. of Educ., 242 F.3d 219 (4th Cir. 2001) 9, 13

Chaffin v. Calhoun, 262 Ga. 202 (1992) 17, 18

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988)..... 6

Cortez v. County of Los Angeles, 294 F.3d 1186 (9th Cir. 2002) 10

Cozzo v. Tangipahoa Parish Council-President Government, 279 F.3d 273 (5th Cir. 2002) 9

DeGenova v. Sheriff of DuPage County, 209 F.3d 973 (7th Cir. 2002).....10, 13

Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998) ...5, 10, 13

Grayson v. Peed, 195 F.3d 692 (4th Cir. 1999)..... 9

Grayson v. Royer, 529 U.S. 1067, 120 S.Ct. 1673 (2000)..... 10

Grech v. Clayton County, 335 F.3d 1326 (11th Cir. 2003).....*passim*

Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996)..... 9

Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997)..... 10

TABLE OF AUTHORITIES – Continued

Page

Hess v. Port Authority Trans-Hudson, Corp., 513 U.S. 30 (1994) 2, 13

Huminski v. Corsones, 396 F.3d 53 (2nd Cir. 2005) 10

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) 15

Kentucky v. Graham, 473 U.S. 159 (1985) 2

Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979) 11, 13

Lowe v. Jones County, 231 Ga. App. 372, 499 S.E.2d 348 (1998) 18

Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003) 5, 7

Mayo v. Fulton County, 220 Ga. App. 825 (1996) 18

McMillian v. Monroe County, Alabama, 520 U.S. 781 (1997) ..... *passim*

Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978) 3, 13, 14

Northern Ins. Co. of N.Y. v. Chatham County, 126 S.Ct. 1689 (2006) 11, 13

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 14

Purcell v. Toombs County, Georgia, 400 F.3d 1313 (11th Cir. 2005) 7

Scott v. O'Grady, 975 F.2d 366 (7th Cir. 1992) 9

Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001) 5, 10, 11

Wayne County v. Herrin, 210 Ga. App. 747, 437 S.E.2d 793 (1993). 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS AND STATUTES

U. S. Constitution
Eleventh Amendment ..... *passim*

28 U.S.C. § 1983 ..... *passim*

Georgia Constitution, 1983,
Art. IX, § 1, ¶ III 17
Art. IX, § 2, ¶ 1(c) 17

O.C.G.A. § 15-16-10 17

O.C.G.A. § 15-16-23 17

O.C.G.A. § 15-16-26(c) 18

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant the Petition in this case. Supreme Court Rule 10 provides that a petition for a writ of certiorari will be granted only for compelling reasons. Subparagraphs (a) through (c) of that rule indicate the character of the reasons this Court considers in making its determination to grant or deny a petition. Although not explicitly stated, the Petition appears to urge this Court to grant certiorari pursuant to subparagraph (c) of Rule 10 on the basis that a state court, i.e. the Georgia Court of Appeals, has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. This case does not meet the standard required for review under Supreme Court Rule 10.

There is nothing about this case that merits this Court granting certiorari to revisit the jurisprudential landscape regarding § 1983 liability of counties. The Georgia Court of Appeals did not err in its application of *McMillian v. Monroe County, Alabama*,[3] and contrary to Petitioner's assertions Eleventh Amendment immunity is simply not a relevant consideration in this case. This case turns on the issue of whether Respondent DeKalb County, Georgia can be liable under § 1983 for a politically motivated murder by sheriff as a final policymaker for the County. This case is not about whether DeKalb County can be liable for a judgment entered against former sheriff Sidney Dorsey in his official capacity, as Dorsey was not

[3] 520 U.S. 781, 117 S.Ct. 1734 (1997).

sued on his official capacity.[4] Petitioner apparently seeks this Court's review in her effort to recover from the County approximately $326,000,000 in compensatory damages awarded as part of a judgment against former sheriff Sidney Dorsey in his *individual* capacity.[5] While a judgment was secured against several defendants in their individual capacities, there has been no trial and no judgment with respect to DeKalb County or any defendant sued in their official capacity.[6]

Petitioner spends a considerable amount of time addressing cases from various Circuit Courts of Appeals she contends misinterpret and misapply *McMillian v. Monroe County* and this Court's Eleventh Amendment immunity jurisprudence. The Petition, however, fails to address any misinterpretation or misapplication of *McMillian* by the Georgia Court of Appeals in the decision at issue.[7] Significantly, none of the errors alleged by Petitioner in other cases are present in the decision of the Georgia Court of Appeals.

The Georgia Court of Appeals did not err in its application of *McMillian* and related precedent. Perhaps the alleged conflicts in Eleventh Amendment immunity jurisprudence would be relevant if suit had been filed against former sheriff Dorsey in his *official capacity,* because under this Court's decision in *Kentucky v. Graham*, "victory in an

---

[4] Respondent's Appendix 1-29.

[5] Petition, 4.

[6] Respondent's Appendix 32-33.

[7] Eleventh Amendment immunity shields states and certain agencies exercising state power from being sued in federal court without their consent. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 115 S. Ct 394 (1994).

official-capacity suit imposes liability on the entity that the officer represents."[8] In this case, however, no such claim was pled or pursued.

The Georgia Court of Appeals' decision closely follows the analytical framework of *McMillian*, evaluating Georgia law and answering the question of whether, based on state law, the governmental official is a final policymaker for the local government in the particular area or function alleged to have resulted in the constitutional violation.[9] As set forth in Section III of this Brief, the Georgia Court of Appeals made the necessary inquiry and used the appropriate analysis in reaching its decision that former sheriff Dorsey was not a policymaker for DeKalb County for the functions at issue.

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT

I. The Georgia Court of Appeals' decision adheres to this Court's § 1983 jurisprudence and, therefore, this Court's review is not warranted.

The Georgia Court of Appeals' well-reasoned and soundly based decision that the sheriff was not a final policymaker for the County on the issues of use of deadly force and use of sheriff's department personnel and resources foreclosed the Petitioner from any pursuit of her claims against the County. The Court examined whether the sheriff was a final policymaker for the County on the

[8] 473 U.S. 159, 105 S.Ct. 3099 (1985) (quoting *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690, n.55, 98 S.Ct. 2018, 2035-2036 n.55 (1978)).

[9] *McMillian*, 520 U.S. at 785.

particular function at issue as required by *McMillian*.[10] The Georgia Court of Appeals examined how sheriffs operate in Georgia after a review of the Georgia constitution, statutes and case decisions. In addition, the Georgia Court of Appeals' decision references *Grech v. Clayton County, Georgia*,[11] a decision of the Eleventh Circuit Court of Appeals that closely follows this Court's analysis in *McMillian* and includes an extensive discussion of Georgia's constitution, statutes and case law regarding the status of sheriffs, their role and their relationship to the State and counties in Georgia.

In *McMillian* this Court indicated its traditional deference to the expertise of state-based jurists in interpreting state law.[12] The Georgia Court of Appeals and Eleventh Circuit Court of Appeals are deserving of such deference in this case.

II. The Circuit Courts of Appeals' decisions discussed by the Petition as indicative of a split in the circuits are irrelevant to this case. The "sea" of § 1983 jurisprudence remains unchanged.

Contrary to the Petitioner's assertion, there has not been a "sea change" in § 1983 liability since *McMillian*. In the post-*McMillian* years, litigants on both sides of the so-called split or chasm have attempted to secure review regarding decisions reached by the Eleventh, Seventh and

---

[10] 520 U.S. at 785; Petition, App. 12a.

[11] 335 F.3d 1326 (11th Cir. 2003).

[12] 520 U.S. at 786 ("We generally accord great deference to the interpretation and application of state law by the Courts of Appeals").

Ninth Circuit Courts of Appeal concerning the status of sheriffs and the availability of Eleventh Amendment immunity. This Court has declined to accept those cases.[13] Arguably, this indicates that this Court as recently as 2003 did not believe that revisiting *McMillian* or the decisions that constitute this Court's Eleventh Amendment jurisprudence was necessary. A similar denial is warranted here because the Georgia Court of Appeals adhered to *McMillian* and used the appropriate analytical framework set forth therein.

A. In *McMillian* this Court anticipated that there would not be a uniform national characterization for all sheriffs.

Petitioner calls upon this Court to grant certiorari for the purpose of articulating a "uniform test" to be applied in both state and federal courts with respect to the § 1983 liability of counties in order to yield consistency in the application of the various factors in the *McMillian* analysis.[14] No such test is appropriate, however, because as recognized in *McMillian*, due to the federal system the role of sheriffs and counties varies from State to State; "there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another."[15] There have been different outcomes among the circuit courts of appeals precisely because *McMillian* involves an analysis that takes account of state law

---

[13] This Court has denied certiorari in *Manders v. Lee*, 540 U.S. 1101 (2003); *Franklin v. Zaruba*, 525 U.S. 1141 (1999); *Streit v. County of Los Angeles*, 534 U.S. 823 (2001).

[14] Petition, 9.

[15] 520 U.S. at 795, 117 S.Ct. at 1741.

regarding sheriffs and the particular function at issue.[16] The state-law specific inquiry required by *McMillian* accounts for the divergent outcomes that the Petition mischaracterizes as a split in the circuits arising from a misinterpretation of *McMillian*. The different outcomes amongst the circuit courts of appeals simply reflect what this Court has described as "the rich variety of ways in which the power of government is distributed among a host of different officials and official bodies."[17]

B. The Eleventh Circuit Court of Appeals correctly applied *McMillian*.

Petitioner describes the Eleventh Circuit Court of Appeals as having misapplied *McMillian* to hold that Georgia sheriffs are essentially state executive officials for all purposes.[18] This is a mischaracterization of the Eleventh Circuit's decisions. Petitioner argues that the Eleventh Circuit broadly construed *McMillian* and "arm-of-the-state" -precedent to sweepingly characterize many local officials as state officers for purposes of § 1983 liability.[19] However, in the Eleventh Circuit's post-*McMillian* decisions considering the status of Georgia sheriffs there have not been any holdings of the breadth argued by the Petition.

For example, in *Grech,* the decision most immediately relevant to the case at bar, the Eleventh Circuit Court of

---

[16] 520 U.S. at 785.

[17] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, 108 S.Ct. 915, 925 (1988).

[18] Petition, 11.

[19] Petition, 16.

Appeals sitting *en banc* affirmed the trial court's finding that the sheriff was not a county policymaker for § 1983 liability purposes for his law enforcement conduct and policies regarding warrant information on state computer systems, or training and supervision of his employees in that regard.[20] *Grech*, on its face is a narrow holding.

In *Manders v. Lee,* a decision whose analysis was *not* relied upon below, the Eleventh Circuit considered a case in which a Georgia sheriff sued in his official capacity asserted Eleventh Amendment immunity in defense of a § 1983 claim.[21] There, the Eleventh Circuit Court of Appeals sitting *en banc* reversed the denial of summary judgment. The Eleventh Circuit, using the "arm-of-the-state" analysis, evaluated Georgia law regarding the relationship among the state, the sheriff and the county and concluded that a Georgia sheriff wears a state hat for Eleventh Amendment purposes when creating and implementing a use-of-force policy at a jail.[22] On its face *Manders* is also a narrow holding.

Those cases indicate that there is nothing of the breadth alleged by Petitioner in the above post-*McMillian* decisions regarding Georgia sheriffs. As exemplified by *Purcell v. Toombs County, Georgia*, the Eleventh Circuit has left room for different conclusions with respect to the application of Eleventh Amendment immunity to the various areas of operation and functions of Georgia

---

[20] *Grech v. Clayton County*, 335 F.3d at 1348.

[21] 338 F.3d at 1309, 1328.

[22] *Id.* at 1328.

sheriffs.[23] That is likely to be equally true of its consideration of whether a sheriff acts as a final policymaker for a Georgia county, particularly given *McMillian*'s explicit rejection of an "all or nothing" approach and the Eleventh Circuit's adherence to *McMillian* in *Grech*.[24]

C. An overwhelming majority of the decisions described as indicative of a split between the Circuit Courts of Appeal address Eleventh Amendment immunity and are irrelevant to the case at bar.

Many of the cases cited to by the Petition as indicative of a split among the circuit courts of appeals, and examples of misapplication and misinterpretation among those courts, do not actually involve a county's § 1983 liability for sheriffs, but rather the invocation of Eleventh Amendment immunity by a sheriff sued in his official capacity. This case does not involve Eleventh Amendment immunity because, as stated previously, there was no official capacity claim against the sheriff in this action. The sheriff did not invoke the Eleventh Amendment because it would not apply to him in his individual capacity; the sole basis upon which he was sued here.[25]

Petitioner attempts to create a split in the circuits out of a patchwork of decisions that do not have any bearing on the issue that the Georgia Court of Appeals considered, liability of final policymakers under § 1983. The Petition

---

[23] 400 F.3d 1313, 1325 (11th Cir. 2005) (where the court "declined to determine that a Georgia sheriff wears a state hat for all purposes").

[24] *See* 335 F.3d 1326.

[25] Respondent's Appendix 1-29.

points to decisions of the Eleventh and Second Circuit Courts of Appeals on the one hand, and the Fourth, Seventh and Ninth Circuit Courts of Appeals on the other, as indicative of a split that warrants this Court's intervention. As set forth below, even a cursory examination of those cases illustrates their irrelevance to the case at bar.

Respondent has already discussed the Eleventh Circuit Court of Appeals' decisions cited by Petitioner as indicative of a split, and has shown this Court that subsequent to *McMillian* the Eleventh Circuit Court of Appeals has followed this Court's direction in analyzing § 1983 liability for counties, most certainly in the case relevant here, *Grech v. Clayton County*. With the exception of the Ninth Circuit cases, the decisions the Petition describes as indicative of a split amongst the circuits overwhelmingly involved Eleventh Amendment immunity[26] and or did not involve claims against counties.[27] There were perhaps a

---

[26] *Scott v. O' Grady*, 975 F.3d 366 (7th Cir. 1992), *cert. denied*, 508 U.S. 942, 113 S.Ct. 2421 (1993), pre-dates *McMillian* and involved a suit against a sheriff and a deputy in their official capacities arising from an eviction. The two defendants invoked Eleventh Amendment immunity as a bar to the § 1983 claim and the court considered whether the defendants were agents of the state entitled to the protection of the Eleventh Amendment when they act to enforce orders issued by the state courts.

[27] *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996) involved Eleventh Amendment immunity and pre-dates *McMillian*. *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) was a Fair Labor Standards Act case that involved an assertion of Eleventh Amendment immunity and did not apply *McMillian*. Similarly, *Cozzo v. Tangipahoa Parish Council-President Government*, 279 F.3d 273 (5th Cir. 2002) involved Eleventh Amendment immunity and made the appropriate application of the multi-factor arm-of-the-state analysis. In *Grayson v. Peed*, 195 F.3d 692 (4th Cir. 1999), admittedly, the court did not cite *McMillian* and engaged in minimal analysis of the county's liability under § 1983, focusing solely on the issue of control. However, this

(Continued on following page)

few aberrant decisions from the Second and Seventh Circuit Courts of Appeals but again, those cases are simply not relevant to this case because they turned on assertions of Eleventh Amendment immunity.[28] Of the four Ninth Circuit Court of Appeals cases cited by Petitioner, all of the decisions involved the question of county liability under § 1983 for the acts of a sheriff, with one failing to make mention of *McMillian*.[29] With respect to the other three cases cited by Petitioner, *Streit v. County of Los Angeles*,[30] *Brewster v. Shasta County*[31] and *Cortez v. County of Los Angeles*,[32] it appears

---

Court denied certiorari. See *Grayson v. Royer*, 529 U.S. 1067, 120 S.Ct. 1673 (2000).

[28] *Huminski v. Corsones*, 396 F.3d 53 (2nd Cir. 2004) (discussing the sheriff's sovereign immunity from liability for § 1983 claims filed against him in his official capacity as preserved by the Eleventh Amendment); *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) (concluding, in a suit against the sheriff in his official capacity, that the sheriff was not acting as an agent of the state with respect to his exercise of custodial power. The court did not perform the arm-of-the-state analysis as one might expect, but instead used *McMillian* to decide the sheriff's entitlement to immunity); *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000) (in a suit against a county sheriff in his official capacity, the court repeated the flawed analysis used in *Franklin, supra*).

[29] *Henry v. County of Shasta*, 132 F.3d 512 (9th Cir. 1998), *cert. denied*, 525 U.S. 819 (1998).

[30] 236 F.3d 522 (9th Cir. 2001), *cert. denied*, 534 U.S. 823 (2001). The court cited to *McMillian* as the applicable analytical framework for deciding whether the county was subject to § 1983 liability for the unconstitutional actions of the sheriff. Thereafter, the court examined California's constitution, statutes and case law, ultimately concluding that the sheriff acts as a final policymaker for county in the administration and the release of inmates from the local jail. This Court denied the County's petition for a writ of certiorari.

[31] 275 F.3d 803 (9th Cir. 2001), *cert. denied*, 537 U.S. 814, 123 S.Ct. 75 (2002).

[32] 294 F.3d 1186, 1187 (9th Cir. 2002).

the Ninth Circuit followed the *McMillian* analysis with respect to county liability. Notably, the court was also required to discuss Eleventh Amendment immunity in *Streit*[33] and that discussion was appropriately separate and distinct from the discussion of county liability.

As discussed above, the majority of the decisions described by Petitioner as indicative of a split in the Circuit Courts of Appeals address Eleventh Amendment immunity and are irrelevant to the case at bar. This Court has not construed the Eleventh Amendment to afford protection to political subdivisions such as counties and cities[34] and this Court has repeatedly refused to extend that immunity to counties.[35] Accordingly, any alleged confusion among the Circuit Courts of Appeals regarding the application of Eleventh Amendment immunity, which the County did not and could not assert in this case, is simply not relevant here.

Accordingly, the Petition should be denied because this case does not involve Eleventh Amendment immunity and the concerns raised by the Petition are not relevant to this case. In rendering the decision at issue, the Georgia Court of Appeals closely followed this Court's analysis in *McMillian*, applying the same framework and evaluating similar legal provisions. For that reason, no further review is warranted.

---

[33] 236 F.3d at 566.

[34] *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-401, 99 S.Ct. 1171, 1177 (1979).

[35] *Northern Ins. Co. of N.Y. v. Chatham County, Georgia*, 126 S.Ct. 1689 (2006).

III. Under Georgia law former sheriff Dorsey was a policymaker for the State of Georgia for the functions at issue. The hypothetical possibility that local officials may exercise autonomous power independent from counties and States is of no consequence under the facts of this case.

Petitioner asserts that this Court should accept its Petition because the Georgia Court of Appeals' decision in this case does not address the possibility that local officials could exercise autonomous power independent from counties and states. In support of its argument, Petitioner seeks to draw distinctions between the decision of the Georgia Court of Appeals and several federal Circuit Court cases involving Eleventh Amendment immunity.[36] Petitioner argues that the Georgia Court of Appeals improperly applied the § 1983 policymaker test as an "all or nothing" proposition, and, according to Petitioner, incorrectly jumped from a finding that the county did not control the sheriff to the "conclusion that Dorsey must be a state officer immune under § 1983" while overlooking the possibility that the sheriff could be an autonomous, independent officer.[37]

Petitioner's argument is not persuasive because it mischaracterizes the decision of the Georgia Court of Appeals and appears to confuse Eleventh Amendment immunity analysis with the § 1983 final policymaker

---

[36] Petition, 20-22.

[37] Petition, 20.

analysis set forth in *McMillian v. Monroe County, Alabama* and followed by the Georgia Court of Appeals.[38]

A. This case does not involve Eleventh Amendment Immunity.

Petitioner repeatedly attempts to draw contrasts between this case and cases turning on the grant or denial of Eleventh Amendment immunity in an effort to convince this Court to grant certiorari. Notably, neither *McMillian* nor the decision of the Georgia Court of Appeals in this case rely upon, or even discuss, Eleventh Amendment immunity. The Georgia Court of Appeals decision did *not* conclude that former sheriff Dorsey was an "arm-of-the-state" or otherwise rely upon the Eleventh Amendment jurisprudence of which Petitioner complains.[39] Petitioner's arguments to the contrary overlook the fact that this case turns on a different analysis, with the question being solely whether former sheriff Dorsey was a policymaker for DeKalb County on the issues of use of deadly force and use of sheriff's department personnel and resources.[40] The Georgia Court of Appeals properly analyzed the relevant question, with its analysis closely following this Court's decision in *McMillian*.[41]

---

[38] *McMillian*, 520 U.S. 781, 117 S.Ct. 1734 (1997); *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-2038 (1978).

[39] *Compare Northern Ins. Co. of New York*, 126 S.Ct. 1689; *Hess*, 513 U.S. 30, 115 S.Ct. 394; *Lake Country Estates, Inc.*, 440 U.S. 391, 99 S.Ct. 1171; *Franklin*, 150 F.3d 682; *DeGenova*, 209 F.3d 973; *Cash*, 242 F.3d 219.

[40] *See McMillian*, 520 U.S. at 786, 117 S.Ct. at 1737.

[41] 520 U.S. 781, 117 S.Ct. 1734.

B. The Georgia Court of Appeals correctly found that former sheriff Dorsey was not a policymaker for the County for the functions at issue.

Petitioner mischaracterizes the Georgia Court of Appeals' decision when he argues that the court's holding was based upon a mere lack of county control. To the contrary, the Georgia Court of Appeals applied the same analysis set forth in *McMillian*, looking at the elements of state law considered by this Court in that case, and found that because Georgia sheriffs are empowered, directed and controlled by state law in the functions at issue, former sheriff Dorsey was a policymaker for the State for purposes of § 1983 liability.[42] The decision was not based upon a knee-jerk reaction that "because county did not exercise authority over sheriff's use of deadly-force policies or law enforcement personnel and resources, the state exercised control over those functions."[43] Rather, the Georgia Court of Appeals conducted a detailed analysis and found that state empowerment, direction and control of former sheriff Dorsey in the functions at issue indicated that Dorsey was not a policymaker for DeKalb County when performing those functions.

---

[42] As discussed in *Monell v. Dep't of Social Servs.*, a local government such as DeKalb County is liable under § 1983 only for its policies or customs that cause constitutional torts. 436 U.S. 658, 98 S.Ct. 2018 (1978). While DeKalb County takes issue with the Georgia Court of Appeals' conclusion that sheriff Dorsey's private decision to commit malice murder on his own time could constitute a policy under the reasoning of *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986), we do not take up the issue at this juncture.

[43] *Compare* Petition, 20.

A comparison of the analytical framework of *McMillian* with the framework applied by the Georgia Court of Appeals in this case shows that the Petition for Writ of Certiorari should be denied. In *McMillian*, this Court considered whether an Alabama sheriff was a policymaker for the State or the county for purposes of liability under 42 U.S.C. § 1983 when acting in a law enforcement capacity.[44] The Court noted that in determining a local government's § 1983 liability, a court's task is to "identify those who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the constitutional violation at issue."[45] This Court began by holding that the question of whether the sheriff was a policymaker for the State or the county depended on state law, and for that reason the analysis of the Eleventh Circuit Court of Appeals, most familiar with the state law concepts at issue, would be entitled to considerable deference.[46] In *McMillian*, this Court framed the question as whether, under Alabama law, a sheriff is a policymaker for the State or the county when he acts in a law enforcement capacity.[47]

In answering the question in *McMillian*, this Court reviewed the Alabama Constitution, Code, and Eleventh Circuit and the Alabama Supreme Court precedent construing such authority. In particular, this Court considered the Alabama Constitution, which designated sheriffs as "constitutional officers" and members of the "executive

---

[44] *McMillian*, 520 U.S. 781, 117 S.Ct. 1734 (1997).

[45] *McMillian*, 520 U.S. at 785 (*citing Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 2723-2724 (1989)).

[46] 520 U.S. at 786, 117 S.Ct. at 1734.

[47] *Id.*

department" of state government, with only the State Supreme Court and Governor empowered to impeach sheriffs.[48] The Alabama Code defined sheriffs' duties as primarily acting on behalf of the state courts, with a responsibility to submit reports and evidence collected in investigating crimes to the district attorney.[49] Under Alabama law, county governing bodies were found to have no power to instruct a sheriff on how to carry out the duties of his or her office.[50] In a point designated as critical by the *McMillian* Court, the Alabama Supreme Court had concluded from its review of State constitutional and statutory provisions that sheriffs were executive officers of the state, and had held unequivocally: "sheriffs are state officers, and . . . claims brought against sheriffs based on their official acts therefore constitute suits against the State, not suits against the sheriff's county."[51] This Court ultimately held that an Alabama sheriff acting in a law enforcement capacity acts as a policymaker for the State.

The *McMillian* Court considered and rejected several factors argued to show that an Alabama sheriff should be considered a county officer. For example, the Court noted the sheriff's salary was paid out of the county treasury, the county was required to fund the expenses of the sheriff's office "to the extent reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office," the sheriff's jurisdiction was limited to the borders

---

[48] 520 U.S. at 788-789, 117 S.Ct. at 1738-1739.

[49] 520 U.S. at 789-790, 117 S.Ct. at 1739.

[50] 520 U.S. at 788-789, 117 S.Ct. at 1738-1739 (Under Alabama law, governing body of counties cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime).

[51] 520 U.S. at 789, 117 S.Ct. at 1738.

of his county, and the sheriff was elected locally by county voters.[52] Such factors were found by the *McMillian* court to be insufficient to overcome the constitutional, statutory and case decisions holding that Alabama sheriffs were policymakers for the state when acting in their law enforcement capacity.

In this case, the Georgia Court of Appeals followed the analysis set forth in *McMillian* and determined that former sheriff Dorsey was not a policymaker for the County functions at issue: the use of deadly-force and use of law enforcement personnel and resources. Similar to *McMillian,* the Georgia Court of Appeals examined the Georgia Constitution, Georgia statutes, and interpretive case law. The Georgia Court of Appeals considered that the Georgia constitution, while nominally designating the sheriff as a "county officer," grants the legislature exclusive authority to establish a sheriff's powers, duties, qualifications and minimum salary.[53] Further, the Georgia constitution specifically exempts the sheriff's office from modification by counties pursuant to their local legislative powers.[54] Georgia law defines a sheriff's duties,[55] providing that the sheriff alone has the power to hire and fire his deputies and sheriffs,[56] and that only the Governor of the

---

[52] 520 U.S. at 791, 117 S.Ct. at 1740.

[53] *See* the decision of the Georgia Court of Appeals in this matter, attached to the Petition, App. 10a, *citing* Ga. Const. of 1983, Art. IX, § 1, ¶ III(a)-(b); *See also Chaffin v. Calhoun*, 262 Ga. 202, 203, 415 S.E.2d 906 (1992).

[54] Petition, App. 12a, n.31; *See* Ga. Const. of 1983, Art. IX, § 2, ¶ 1(c).

[55] Petition, App. 10a, n.20, *citing* O.C.G.A. § 15-16-10.

[56] Petition, App. 12a, *citing* O.C.G.A. § 15-16-23.

State of Georgia is authorized to suspend a Georgia sheriff.[57]

On an aspect of the analysis deemed *critical* by the *McMillian* Court, the Georgia Supreme Court's decisions interpreting the Georgia constitution and State law support, if not require, the conclusion that the former sheriff was a policymaker for the State with respect to the use of deadly-force and law enforcement personnel and resources. The Georgia Supreme Court has held that the "sheriff is an elected, constitutional officer; he is subject to the charge of the General Assembly and is not an employee of the county commission."[58] The Georgia Supreme Court has similarly held that deputy sheriffs are employees of the sheriff, not the county, and the county cannot be held vicariously liable for the negligence of sheriff's deputies.[59] While Georgia county commissions set the sheriff's budget and must provide reasonably sufficient funds to allow the sheriff to discharge his legal duties, a county "may not dictate to the sheriff how that budget will be spent in the exercise of his duties."[60] Moreover, like in *McMillian*, only the Governor of the State of Georgia is authorized to suspend a Georgia sheriff.[61]

---

[57] Petition, App. 12a, *citing* O.C.G.A. § 15-16-26(c).

[58] Petition, App. 10a-11a, *citing Bd. of Commrs. Of Randolph County v. Wilson*, 260 Ga. 482, 396 S.E.2d 903 (1990), *Bd. of Commrs. Of Dougherty County v. Saba*, 278 Ga. 176, 177, 598 S.E.2d 437 (2004) and *Mayo v. Fulton County*, 220 Ga. App. 825, 470 S.E.2d 258 (1996).

[59] Petition, App. 12a, *citing Lowe v. Jones County*, 231 Ga. App. 372, 373, 499 S.E.2d 348 (1998), *Brown v. Jackson*, 221 Ga. App. 200, 201, 470 S.E.2d 786 (1996), *Wayne County v. Herrin*, 210 Ga. App. 747, 751, 437 S.E.2d 793 (1993).

[60] Petition, App. 13a, n.33-35; *See Chaffin*, 262 Ga. at 203.

[61] Petition, App. 12a.

Further, in an extensive opinion, the Eleventh Circuit Court of Appeals in *Grech* held that a Georgia sheriff was not a policymaker for the county when acting in his law enforcement function and, more specifically, with regard to maintenance of a computer warrant system.[62] *Grech* noted among other things that "[t]here is not a single Georgia case . . . holding a *county* liable for the torts of a sheriff or his deputies."[63] *Grech* was referred to as persuasive and extensively cited by the Georgia Court of Appeals in its decision in this case.[64]

Considering Georgia state constitutional and statutory authority, and the Georgia appellate court and Eleventh Circuit Court of Appeals opinions construing such authority, it is clear that Georgia sheriffs are policymakers for the state on the functions at issue in this case. The Georgia Court of Appeals properly applied the *McMillian* analysis when it evaluated the Georgia constitution, statutes and case law to answer the question of whether former sheriff Dorsey was a policymaker for the State or the County on use of deadly-force and use of law enforcement personnel and resources. Like sheriffs in Alabama, the powers and duties of Georgia sheriffs are dictated by the State, with only State officials having any oversight or control of sheriffs. Like in *McMillian*, the Georgia law in favor of Respondent's position outweighs any provisions of law that cut in favor of the conclusion that Georgia sheriffs are county policymakers.[65] This Court should deny Petitioner's request for certiorari because the Georgia

---

[62] Petition, App. 10a, n.23, *citing Grech*, 335 F.3d at 1348.

[63] Petition, App. 11a; *Grech*, 335 F.3d at 1342 n.32.

[64] *Id.*

[65] *Compare McMillian*, 520 U.S. at 1740.

Court of Appeals properly analyzed the relevant question, with its analysis closely following the analytical framework set forth by this Court in *McMillian*.

CONCLUSION

For the reasons set forth herein, the Petition for Certiorari should be denied.

Respectfully submitted,

WILLIAM J. LINKOUS, III
County Attorney
Counsel of Record

DEKALB COUNTY LAW DEPARTMENT
1300 Commerce Drive
Decatur, Georgia, 30030
Tel: (404) 371-3011

DUANE D. PRITCHETT
SAM L. BRANNEN, JR.
MELANIE F. WILSON
Of Counsel

DEKALB COUNTY LAW DEPARTMENT
1300 Commerce Drive
Decatur, Georgia, 30030
(404) 371-3011

APPENDIX

IN THE SUPERIOR COURT OF GWINNETT COUNTY STATE OF GEORGIA

PHYLLIS BROWN, Individually as surviving spouse and as Executrix of the Estate of DERWIN BROWN, deceased,	)	
Plaintiffs,	)	**CIVIL ACTION FILE NO.: 02-A-12772**
vs.	)	
SIDNEY DORSEY, in his Individual Capacity, SECURITY INVESTIGATION DIVISION, INC., MECCA SECURITY, INC., MELVIN D. WALKER, in his Individual Capacity, PATRICK CUFFY, in his Individual Capacity, PAUL SKYERS, DAVID I. RAMSEY, and DEKALB COUNTY,	)	
Defendants.	)	

COMPLAINT

(Filed Nov. 21, 2002)

COMES NOW Phyllis Brown, Plaintiff in the above-styled action, and shows this Court as follows:

JURISDICTION AND VENUE

1.

Plaintiff Phyllis Brown is a citizen of the State of Georgia.

2.

Defendant Sidney Dorsey, the former Sheriff of DeKalb County, is presently a prisoner in the custody of the State of Georgia. Prior to his incarceration, Defendant Sidney Dorsey was most recently known to reside in DeKalb County at 1891 Montvallo Terrace SE, Atlanta, GA 30316-2812. Defendant Sidney Dorsey is a joint tortfeasor with Defendant Paul Skyers, hence jurisdiction and venue are proper in this Court.

3.

Defendant Security Investigation Division, Inc. (hereinafter "SID") is a Georgia Corporation with its principal place of business in DeKalb County, Georgia. Defendant can be served in DeKalb County through its registered agent, Sherry Dorsey, 1891 Montvallo Terrace SE, Atlanta, GA 30316-2812. Defendant SID is a joint tortfeasor with Defendant Paul Skyers, hence jurisdiction and venue are proper in this Court.

4.

Defendant Mecca Security, Inc. (hereinafter "Mecca") is a Georgia Corporation with its principal place of business in Georgia. Defendant can be served in Rockdale County through its registered agent, Veleria Askew Walker, 3685 Sweet Briar Lane SE, Conyers, GA 30094-3862. Defendant Mecca is a joint tortfeasor with Defendant Paul Skyers, hence jurisdiction and venue are proper in this Court.

5.

Defendant Melvin D. Walker (hereinafter "Walker") is a former Deputy and/or Jailor at the DeKalb County Sheriff's Department. Walker is also the Chief Executive Officer of Defendant Mecca. He can be served in Rockdale County at his place of residence, 3685 Sweet Briar Lane SE, Conyers, GA 30094-3862. Defendant Walker is a joint tortfeasor with Defendant Paul Skyers, hence jurisdiction and venue are proper in this Court.

6.

Defendant Patrick Cuffy (hereinafter "Cuffy") is a former Deputy and/or Jailor at the DeKalb County Sheriff's Department. Defendant Cuffy's last known place of residence was in DeKalb County at 3785 Caseys Cove, Ellenwood, GA 30294. Defendant Cuffy is a joint tortfeasor with Defendant Paul Skyers, hence jurisdiction and venue are proper in this Court.

7.

Defendant Paul Skyers (hereinafter "Skyers") can be served in Gwinnett County at his place of residence, 4398 Redgate Rd NW, Norcross, GA 30093. Jurisdiction and venue are proper in this Court.

8.

Defendant DeKalb County is a political subdivision of the State of Georgia, able to sue and be sued. Defendant DeKalb County can be served by means of service of process upon the Chief Executive Officer, Vernon Jones, at his office at Maloof Center, Sixth Floor, Government

Administration, 1300 Commerce Drive, Decatur, GA 30030. Defendant DeKalb County is a joint tortfeasor with Defendant Skyers, hence jurisdiction and venue are proper in this Court.

9.

Defendant David I. Ramsey (hereinafter "Ramsey") is presently living in St. Croix, VI. Defendant Ramsey is a joint tortfeasor with Defendant Skyers, hence jurisdiction and venue are proper in this Court.

10.

During the year 2000, Defendant Ramsey inflicted tortuous injuries upon Plaintiff and her decedent, Derwin Brown, as described hereafter. Both said tortuous acts and injuries occurred in Georgia. Subsequently, Defendant Ramsey subsequently left the State of Georgia, and, as of the date of the filing of this Complaint, no longer resides within the State of Georgia. Defendant Ramsey is thus subject to the personal jurisdiction of this Court under the Georgia Long Arm Statute, O.C.G.A. § 9-10-91, and is amenable to service of process as provided in O.C.G.A. § 9-10-94.

FACTUAL ALLEGATIONS

11.

Defendant Sidney Dorsey was the Sheriff of DeKalb County, Georgia from January 1, 1997 through December 31, 2000.

12.

As Sheriff of DeKalb County, Defendant Sidney Dorsey was Defendant DeKalb County's managing officer with ultimate policymaking authority on all matters pertaining to (1) the duties and assignments of DeKalb Jailors, Sheriff's Deputies, and other Sheriff's Department personnel, (2) the policies, procedures, and operation of the DeKalb County Jail, (3) the policies and procedures governing the service of legal process, subpoenas, and arrest warrants within DeKalb County, (4) the provision of security at the DeKalb County Courthouse, and (5) the policies and procedures governing the conduct and employment of Sheriff's Department personnel.

13.

During his tenure as Sheriff, Defendant Sidney Dorsey was also the owner or part owner of Defendant SID. Defendant Sidney Dorsey had managerial authority over the operations of Defendant SID.

14.

During the year 2000, Derwin Brown ran against Defendant Sidney Dorsey for the office of Sheriff and defeated Defendant Sidney Dorsey in the primary run-off election, with the result that Defendant Sidney Dorsey's tenure in office expired December 31, 2000.

15.

During his 2000 election bid against Defendant Sidney Dorsey, Derwin Brown campaigned for office on a platform that called for a state criminal investigation of

the administration at the DeKalb County jail, a reorganization of the DeKalb Sheriff's Office reservist program, a private accounting audit and the implementation of a merit hiring procedure.

16.

Derwin Brown called the DeKalb County Jail "a cesspool of corruption."

17.

Between August 8, 2000 and August 31, 2000, Defendant Sidney Dorsey solicited and enlisted Defendants Cuffy, Ramsey, Skyers, and Walker to kill Derwin Brown.

18.

As of August, 2000, Defendants Walker and Cuffy worked for the DeKalb County Sheriff's Office as Deputies and/or Jailors.

19.

As of August, 2000, Defendant SID employed or had employed Defendants Cuffy, Ramsey, Skyers, and Walker as providers of security services.

20.

As of August, 2000, Defendant Walker was an owner or part owner, as well as employee, of Defendant Mecca.

21.

As of August, 2000, Defendant Mecca employed or had employed Defendant Skyers as a provider of security services.

22.

Between August 8, 2000, and December 15, 2000, Defendant Sidney Dorsey met with Defendants Cuffy, Walker, Ramsey, and Skyers in DeKalb County for the purpose of planning how and where Derwin Brown could be murdered.

23.

Between August 8, 2000, and December 15, 2000, Defendants Cuffy, Walker, Ramsey, and Skyers conducted surveillance, in DeKalb County and elsewhere, on Derwin Brown personally and on his residence.

24.

Between August 8, 2000, and December 15, 2000, Defendants Cuffy, Walker, Ramsey, and Skyers obtained firearms for the purpose of killing Derwin Brown.

25.

Between August 9, 2000, and August 12, 2000, in DeKalb County, Defendant Sidney Dorsey reassigned Defendant Cuffy from the Jail Division to Community Relations in order to allow Defendant Cuffy to more easily participate in the planning and execution of the conspiracy to murder Derwin Brown.

26.

On or about September 23, 2000, in DeKalb County, DeKalb County Board of Education School Resource Officer Karey Harris encountered Defendant Cuffy and/or Defendants Walker, Ramsey, and Skyers during an aborted attempt to murder Derwin Brown at his residence or to conduct surveillance of Derwin Brown for the purpose of facilitating his murder. Defendant Sidney Dorsey stated to School Resources Officers that Defendant Cuffy was on a special assignment for Defendant Sidney Dorsey.

27.

Between August 8, 2000, and December 15, 2000, Defendants Sidney Dorsey, Cuffy, Walker, Ramsey, and Skyers discussed the consideration or compensation that Defendants Ramsey, Skyers, and Walker would receive for their participation in the murder of Derwin Brown.

28.

On or about October 30, 2000, Defendant Sidney Dorsey ordered Sheriffs Department personnel to hire, on an expedited basis, Defendants Skyers and Ramsey, as consideration for Defendants Skyers' and Ramsey's participation in the conspiracy to murder Derwin Brown.

29.

Between August 8, 2000, and December 15, 2000, Defendant Dorsey ordered that Defendant Walker be given special consideration for admission to the Peace Officer Standards and Training (POST) Mandate School as

consideration for his participation in the conspiracy to murder Derwin Brown.

30.

Between August 8, 2000, and December 15, 2000, Defendants Sidney Dorsey, Cuffy, Walker, Ramsey, and Skyers discussed alibis for the time of the murder.

31.

On or about December 15, 2000, Defendants Walker, Ramsey, Cuffy, and Skyers traveled to the home of Derwin Brown.

32.

While present at the home of Derwin Brown, Defendant Walker intentionally and maliciously shc Derwin Brown and killed him.

33.

During the murder of Derwin Brown, Defendants Ramsey, Cuffy, and Skyers stood by ready to aid Defendant Walker in the event that Defendant Walker required help in committing the murder.

34.

Following the murder of Derwin Brown, Defendants Walker, Ramsey, Cuffy, and Skyers fled the scene together. Defendant Skyers drove the getaway car.

35.

In committing the murder of Derwin Brown, Defendants Walker, Ramsey, Cuffy, and Skyers acted on the orders of Defendant Sidney Dorsey.

36.

Defendants Sidney Dorsey, Cuffy, Walker, Ramsey, Skyers, SID, and Mecca acted in concert to plan, commit, and/or cover-up the murder of Derwin Brown.

37.

Defendants Sidney Dorsey, Cuffy, Walker, Ramsey and Skyers acted with the actual and malicious intent to inflict injury upon Derwin Brown.

COUNT I: WRONGFUL DEATH

38.

The averments set forth in paragraphs 1 through 37 above are hereby incorporated by reference as if fully set forth herein.

39.

Defendant Sidney Dorsey solicited Defendants Cuffy, Walker, Ramsey, and Skyers to commit the murder of Derwin Brown. Defendants Cuffy, Walker, Ramsey, and Skyers agreed to participate and did participate in the planning, preparation, and execution of the murder.

40.

Defendants Sidney Dorsey, Walker, Cuffy, Skyers, and Ramsey, in planning, shooting, or participating in the shooting of Derwin Brown, did unlawfully and with malice aforethought cause Derwin Brow 's death.

41.

At the time of the murder of Derwin Brown, Plaintiff Phyllis Brown was Derwin Brown's lawfully-married wife.

42.

Pursuant to O.C.G.A. § 51-4-2, Defendants Sidney Dorsey, Cuffy, Walker, Ramsey, and Skyers are liable to Plaintiff Phyllis Brown, in her capacity as the surviving spouse of Derwin Brown, for the full value of Derwin Brown's life.

43.

Additionally, Defendants Sidney Dorsey, Walker, Cuffy, Skyers, and Ramsey, in murdering Derwin Brown, acted with an intent to promote the interests of Defendants Mecca and/or SID. Said Defendants therefore acted within the scope of their employment to Defendants Mecca and/or SID.

44.

Therefore, pursuant to O.C.G.A. § 51-4-2 and the doctrine of respondeat superior, Defendants Mecca and SID are liable to Plaintiff Phyllis Brown, in her capacity as

the surviving spouse of Derwin Brown, for the full value of Derwin Brown's life.

COUNT II: SURVIVAL ACTION FOR PAIN AND SUFFERING

45.

The averments set forth in paragraphs 1 through 44 above are hereby incorporated by reference as if fully set forth herein.

46.

Defendant Sidney Dorsey solicited Defendants Cuffy, Walker, Ramsey, and Skyers to commit the murder of Derwin Brown. Defendants Cuffy, Walker, Ramsey, and Skyers agreed to participate and did participate in the planning, preparation, and execution of the murder.

47.

Defendants Sidney Dorsey, Walker, Cuffy, Skyers, and Ramsey, in planning, shooting, or participating in the shooting of Derwin Brown, did unlawfully and with malice aforethought cause Derwin Brown's death.

48.

Derwin Brown experienced pain and suffering, mental anguish, and emotional distress prior to his death.

49.

Defendants Sidney Dorsey, Cuffy, Walker, Ramsey, and Skyers are therefore liable to Plaintiff Phyllis Brown in her capacity as Executrix of Derwin Brown's estate for general damages for injuries caused to her husband, Derwin Brown.

50.

Additionally, Defendants Sidney Dorsey, Walker, Cuffy, Skyers, and Ramsey, in murdering Derwin Brown, acted with an intent to promote the interests of Defendants Mecca and/or SID. Said Defendants therefore acted within the scope of their employment to Defendants Mecca and/or SID.

51.

Therefore, pursuant to the doctrine of respondeat superior, Defendants Mecca and SID are liable to Plaintiff Phyllis Brown, in her capacity as Executrix of Derwin Brown's estate, for general damages for injuries caused to her husband, Derwin Brown.

COUNT III: ACTION FOR MEDICAL AND FUNERAL EXPENSES

52.

The averments set forth in paragraphs 1 through 51 above are hereby incorporated by reference as if fully set forth herein.

53.

Defendant Sidney Dorsey solicited Defendants Cuffy, Walker, Ramsey, and Skyers to commit the murder of Derwin Brown. Defendants Cuffy, Walker, Ramsey, and Skyers agreed to participate and did participate in the planning, preparation, and execution of the murder.

54.

Defendants Sidney Dorsey, Walker, Cuffy, Skyers, and Ramsey, in planning, shooting, or participating in the shooting of Derwin Brown, did unlawfully and with malice aforethought cause Derwin Brown's death.

55.

As the result of the murder of Derwin Brown, Derwin Brown's estate incurred special damages including medical and funeral expenses for Derwin Brown.

56.

Defendants Sidney Dorsey, Cuffy, Walker, Ramsey, and Skyers are therefore liable to Plaintiff Phyllis Brown in her capacity as Executrix of Derwin Brown's estate for special damages for injuries caused to her husband, Derwin Brown.

57.

Additionally, Defendants Sidney Dorsey, Walker, Cuffy, Skyers, and Ramsey, in murdering Derwin Brown, acted with an intent to promote the interests of Defendants Mecca and/or SID. Said Defendants therefore acted

within the scope of their employment to Defendants Mecca and/or SID.

58.

Therefore, pursuant to the doctrine of respondeat superior, Defendants Mecca and SID are liable to Plaintiff Phyllis Brown, in her capacity as Executrix of Derwin Brown's estate, for general damages for injuries caused to her husband, Derwin Brown.

COUNT IV: WRONGFUL DEATH RESULTING FROM THE VIOLATION OF FOURTEENTH AMENDMENT RIGHTS PROTECTED BY 42 U.S.C. § 1983

59.

The averments set forth in paragraphs 1 through 58 above are hereby incorporated by reference as if fully set forth herein.

60.

Defendant Sidney Dorsey employed the resources and manpower of the DeKalb County Sheriffs Department, including two deputies, Defendants Walker and Cuffy, to murder Derwin Brown.

61.

Defendants Sidney Dorsey, Walker, and Cuffy, acting jointly with Defendants Skyers and Ramsey, committed the murder of Derwin Brown under color of state law.

62.

As Sheriff of DeKalb County, Defendant Sidney Dorsey was the final policymaker for Defendant DeKalb County in matters concerning the use of deadly force by Sheriff's Department personnel, the direction and control of Deputies and Jailors, and the direction, control, and use of Sheriff's Department materials, equipment, and resources. Defendant DeKalb County therefore bears liability for the actions of Defendant Sidney Dorsey taken under color of state law.

63.

Defendants Sidney Dorsey, Walker, Cuffy, Ramsey, Skyers, and DeKalb County have therefore acted under color of state law by murdering Derwin Brown and have thereby deprived Derwin Brown of his life, liberty, and bodily integrity without due process of law in violation of Derwin Brown's rights as protected by the Fourteenth Amendment of the United States Constitution.

64.

As the actual and proximate result of the actions of Defendants as aforesaid, Derwin Brown died.

65.

At the time of the murder of Derwin Brown, Plaintiff Phyllis Brown was Derwin Brown's lawfully-married wife.

66.

Pursuant to 42 U.S.C. § 1983 and O.C.G.A. § 51-4-2, Defendants DeKalb County, Skyers, and Ramsey as well as Defendants Sidney Dorsey, Walker, and Cuffy in their individual capacities, are liable to Plaintiff Phyllis Brown, in her capacity as the surviving spouse of Derwin Brown, for the full value of Derwin Brown's life.

COUNT V: SURVIVAL ACTION FOR THE VIOLATION OF FOURTEENTH AMENDMENT RIGHTS PROTECTED BY 42 U.S.C. § 1983

67.

The averments set forth in paragraphs 1 through 66 above are hereby incorporated by reference as if hilly set forth herein.

68.

Defendant Sidney Dorsey employed the resources and manpower of the DeKalb County Sheriff's Department, including two deputies, Defendants Walker and Cuffy, to murder Derwin Brown.

69.

Defendants Sidney Dorsey, Walker, and Cuffy, acting jointly with Defendants Skyers and Ramsey, committed the murder of Derwin Brown under color of state law.

70.

As Sheriff of DeKalb County, Defendant Sidney Dorsey was the final policymaker for Defendant DeKalb County in matters concerning the use of deadly force by Sheriff's Department personnel, the direction and control of Deputies and Jailors, and the direction, control, and use of Sheriff's Department materials, equipment, and resources. Defendant DeKalb County therefore bears liability for the actions of Defendant Sidney Dorsey taken under color of state law.

71.

Defendants Sidney Dorsey, Walker, Cuffy, Ramsey, Skyers, and DeKalb County have therefore acted under color of state law by murdering Derwin Brown and have thereby deprived Derwin Brown of his life, liberty, and bodily integrity without due process of law in violation of Derwin Brown's rights as protected by the Fourteenth Amendment of the United States Constitution.

72.

As the actual and proximate result of the actions of Defendants as aforesaid, Derwin Brown died.

73.

Derwin Brown experienced pain and suffering, mental anguish, and emotional distress prior to his death.

74.

As a result of the murder of Derwin Brown, the estate of Derwin Brown incurred special damages including medical and funeral expenses.

75.

Pursuant to 42 U.S.C. § 1983, Defendants DeKalb County, Skyers, and Ramsey, as well as Defendants Sidney Dorsey, Walker, and Cuffy in their individual capacities, are liable to Plaintiff Phyllis Brown, in her capacity as Executrix of Derwin Brown's estate, for general and special damages for injuries caused to her husband, Derwin Brown. Furthermore, Plaintiff is entitled to an award of punitive damages to punish Defendants Sidney Dorsey, Walker, Cuffy, Ramsey, and Skyers for their intentional depravation of Plaintiff's constitutional rights and to deter said Defendants from similar misconduct in the future.

COUNT VI: WRONGFUL DEATH RESULTING FROM THE VIOLATION OF FIRST AMENDMENT RIGHTS PROTECTED BY 42 U.S.C. § 1983

76.

The averments set forth in paragraphs 1 through 75 above are hereby incorporated by reference as if fully set forth herein.

77.

Defendant Sidney Dorsey employed the resources and manpower of the DeKalb County Sheriff's Department,

including two deputies, Defendants Walker and Cuffy, to murder Derwin Brown.

78.

Defendant Dorsey murdered Derwin Brown to prevent Derwin Brown from taking office at the expiration of Dorsey's term.

79.

Defendants Sidney Dorsey, Walker, and Cuffy, acting jointly with Defendants Skyers and Ramsey, committed the murder of Derwin Brown under color of state law.

80.

As Sheriff of DeKalb County, Defendant Sidney Dorsey was the final policymaker for Defendant DeKalb County in matters concerning the use of deadly force by Sheriff's Department personnel, the direction and control of Deputies and Jailors, and the direction, control, and use of Sheriff's Department materials, equipment, and resources. Defendant DeKalb County therefore bears liability for the actions of Defendant Sidney Dorsey taken under color of state law.

81.

Defendants Sidney Dorsey, Walker, Cuffy, Ramsey, Skyers, and DeKalb County have therefore acted under color of state law by murdering Derwin Brown in retaliation for his exercising of his right to campaign for public office and to speak out on matters of public concern, as

protected by the First Amendment of the United States Constitution and as applied to the State of Georgia by the Fourteenth Amendment of the United States Constitution.

82.

As the actual and proximate result of the actions of Defendants as aforesaid, Derwin Brown died.

83.

At the time of the murder of Derwin Brown, Plaintiff Phyllis Brown was Derwin Brown's lawfully-married wife.

84.

Pursuant to 42 U.S.C. § 1983 and O.C.G.A. § 51-4-2, Defendants DeKalb County, Skyers, and Ramsey, as well as Defendants Sidney Dorsey, Walker, and Cuffy in their individual capacities, are liable to Plaintiff Phyllis Brown, in her capacity as the surviving spouse of Derwin Brown, for the full value of Derwin Brown's life.

COUNT VII: SURVIVAL ACTION FOR THE VIOLATION OF FIRST AMENDMENT RIGHTS PROTECTED BY 42 U.S.C. § 1983

85.

The averments set forth in paragraphs 1 through 84 above are hereby incorporated by reference as if fully set forth herein.

86.

Defendant Sidney Dorsey employed the resources and manpower of the DeKalb County Sheriff's Department, including two deputies, Defendants Walker and Cuffy, to murder Derwin Brown.

87.

Defendant Dorsey murdered Derwin Brown to prevent Derwin Brown from taking office at the expiration of Dorsey's term.

88.

Defendants Sidney Dorsey, Walker, and Cuffy, acting jointly with Defendants Skyers and Ramsey, committed the murder of Derwin Brown under color of state law.

89.

As Sheriff of DeKalb County, Defendant Sidney Dorsey was the final policymaker for Defendant DeKalb County in matters concerning the use of deadly force by Sheriff's Department personnel, the direction and control of Deputies and Jailors, and the direction, control, and use of Sheriff's Department materials, equipment, and resources. Defendant DeKalb County therefore bears liability for the actions of Defendant Sidney Dorsey taken under color of state law.

90.

Defendants Sidney Dorsey, Walker, Cuffy, Ramsey, Skyers, and DeKalb County have therefore acted under

color of state law by murdering Derwin Brown in retaliation for exercising of his right to campaign for public office and to speak out on matters of public concern, as protected by the First Amendment of the United States Constitution and as applied to the State of Georgia by the Fourteenth Amendment of the United States Constitution.

91.

As the actual and proximate result of the actions of Defendants as aforesaid, Derwin Brown died.

92.

Derwin Brown experienced pain and suffering, mental anguish, and emotional distress prior to his death.

93.

Additionally, as a result of the murder of Derwin Brown, the estate of Derwin Brown incurred special damages including medical and funeral expenses.

94.

Pursuant to 42 U.S.C. § 1983,Defendants DeKalb County, Ramsey, and Skyers, as well as Defendants Sidney Dorsey, Walker, and Cuffy in their individual capacities, are liable to Plaintiff Phyllis Brown, in her capacity as Executrix of Derwin Brown's estate, for general and special damages for injuries caused to her husband, Derwin Brown. Furthermore, Plaintiff is entitled to an award of punitive damages to punish Defendants Sidney Dorsey, Walker, Cuffy, Skyers, and Ramsey for their

intentional depravation of Plaintiff s constitutional rights and to deter said Defendants from similar misconduct in the future.

COUNT VIII: PUNITIVE DAMAGES

95.

The averments set forth in paragraphs 1 through 94 above are hereby incorporated by reference as if fully set forth herein.

96.

The actions of Defendants Sidney Dorsey, Cuffy, Walker, Ramsey, Skyers, SID, and Mecca as aforesaid show willful misconduct, malice, wantonness, oppression, or that entire want of care that would raise the presumption of conscious indifference to consequences, such that Plaintiff Phyllis Brown, in her capacity as Executrix of the Estate of Derwin Brown, is entitled to recover punitive damages to deter Defendants from similar wrongful conduct in the future in such amount as shall be determined by an impartial finder of fact.

ANTE LITEM NOTICE PRESENTED

97.

The averments set forth in paragraphs 1 through 96 above are hereby incorporated by reference as if fully set forth herein.

98.

On December 14, 2001, Plaintiff made written presentment of her claims for the official misconduct of Defendant Sidney Dorsey, including wrongful death, general damages, and special damages, to Defendant DeKalb County. Plaintiff presented said claims via letter to Vernon Jones, the Chief Executive Officer, and Thomas E. Brown, the current Sheriff of DeKalb County.

[Signatures on Next Page]

WHEREFORE Plaintiff prays,

(a) That summons issue and process be served upon Defendants;

(b) That Plaintiff have trial by a jury of twelve (12) persons;

(c) That Plaintiff, in her capacity as executrix of Derwin Brown's estate, recover general damages from Defendants Sidney Dorsey, SID, Mecca, Walker, Ramsey, Cuffy, Skyers, and DeKalb County in an amount to be determined in the enlightened conscience of a jury;

(d) That Plaintiff, in her capacity as executrix of Derwin Brown's estate, recover special damages from Defendants Sidney Dorsey, SID, Mecca, Walker, Ramsey, Cuffy, Skyers, and DeKalb County for medical and funeral expenses in amounts to be proven at trial;

(e) That Plaintiff, in her capacity as surviving spouse of Derwin Brown, recover damages from Defendants Sidney Dorsey, SID, Mecca, Walker, Ramsey, Cuffy, Skyers, and DeKalb County for the full value of Derwin Brown's

life, said amount to exceed fifty million dollars ($50,000,000.00);

(f) The Plaintiff recover punitive damages against Defendants SID, Mecca, Ramsey, and Skyers, as well as Defendants Sidney Dorsey, Walker, and Cuffy in their individual capacities, in an amount to be determined in the enlightened conscience of a jury;

(g) That Plaintiff recover her costs and attorney's fees in this action, pursuant to 42 USC § 1988, O.C.G.A.§ 13-6-11, and other applicable Federal and state law; and

(h) That Plaintiff have such other relief as this Court may deem just and proper.

Respectfully submitted this 21st day of November, 2002.

CASEY GILSON LEIBEL P.C.

By: /s/ Steven K. Leibel
STEVEN K. LEIBEL
Georgia State Bar No. 445050

/s/ George P. Shingler
GEORGE P. SHINGLER
Georgia State Bar No. 642850

MICHAEL T. MCCULLEY
Georgia State Bar No. 486989
Attorneys for Plaintiff

31st Floor
Six Concourse Parkway
Atlanta, Georgia 30328
(770) 512-0300
Fax (770) 512-0070

**IN THE SUPERIOR COURT OF
GWINNETT COUNTY
STATE OF GEORGIA**

PHYLLIS BROWN, Individually as surviving spouse and as Executrix of the Estate of DERWIN BROWN, deceased,	)	**CIVIL ACTION FILE NO.: 02-A-12722-7**
Plaintiffs,	)	
vs.	)	
SIDNEY DORSEY, in his Individual Capacity, SECURITY INVESTIGATION DIVISION, INC., MECCA SECURITY, INC., MELVIN D. WALKER, in his Individual Capacity, PATRICK CUFFY, in his Individual Capacity, PAUL SKYERS, DAVID I. RAMSEY, and DEKALB COUNTY,	)	
Defendants.	)	

AMENDED COMPLAINT

(Filed Aug. 15, 2003)

COMES NOW Phyllis Brown, Plaintiff in the above-styled action, and shows this Court as follows:

1.

Plaintiff incorporates paragraphs 1 to 98 of her original Complaint as fully and completely as if they were set forth verbatim herein.

2.

Plaintiff incorporates the "Wherefore" paragraph of her original Complaint as fully and completely as if it were set forth verbatim herein.

3.

Plaintiff hereby adds the following to her original Complaint as paragraph 99: In violating Derwin Brown's federally-protected constitutional rights, as alleged in Counts IV, V, VI, and VII of Plaintiff's Complaint, Defendant Sidney Dorsey acted, pursuant to his authority as Sheriff of DeKalb County, to implement a policy of keeping himself in office by eliminating his competition.

Respectfully submitted this 13th day of August, 2003.

CASEY GILSON LEIBEL P.C.

By: /s/ Steven K. Leibel
STEVEN K. LEIBEL
Georgia State Bar No. 445050

GEORGE P. SHINGLER
Georgia State Bar No. 642850

MICHAEL T. MCCULLEY
Georgia State Bar No. 486989
Attorney for Plaintiff

31st Floor
Six Concourse Parkway
Atlanta, Georgia 30328
(770) 512-0300
(770) 512-0070 (fax)

IN THE SUPERIOR COURT OF GWINNETT COUNTY STATE OF GEORGIA

PHYLLIS BROWN,	)	**CIVIL ACTION FILE**
Plaintiff,	)	**NO.: 02-A-12722-7**
	)	
vs.	)	
SIDNEY DORSEY et al.,	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the *Amended Complaint* upon all parties by depositing a true and exact copy of the same in the United States Mail with proper postage affixed and addressed as follows:

Xernia L. Fortson
DeKalb County Law Department
Senior Assistant County Attorney
1300 Commerce Drive, 5th Floor Decatur, GA 30030

Brian Steel
The Steel Law Firm, P.C.
Suite 300
1800 Peachtree Road, NW
Atlanta, GA 30309

Duane Jones
Duane Jones & Associates
Suite 117
5036 Snapfinger Woods Drive
Decatur, GA 30035

Albert A. Mitchell
Albert A. Mitchell, P.C.
The C&S Professional Building
3079 Campbellton Road, Suite 203
Atlanta, GA 30311

Security Investigation Division, Inc.
c/o Sherry Dorsey
1891 Montvallo Terrace SE
Atlanta, GA 30316-2812.

Paul Skyers
4398 Redgate Rd NW
Norcross, GA 30093.

Respectfully submitted this 13th day of August, 2003.

CASEY GILSON LEIBEL P.C.

/s/ Michael T. McCulley
Michael T. McCulley
Georgia Bar No.: 486989

31st Floor
Six Concourse Pkwy
Atlanta, Georgia 30328
(770) 512-0300 [voice]
(770) 512-0070 [facsimile]

IN THE SUPERIOR COURT OF GWINNETT COUNTY STATE OF GEORGIA

PHYLLIS BROWN, Individually as surviving spouse and as Executrix of the Estate of DERWIN BROWN, deceased,	)	**CIVIL ACTION FILE NO.: 02-A-12722-7**
Plaintiffs,	)	
vs.	)	
SIDNEY DORSEY, PATRICK CUFFY, and PAUL SKYERS,	)	
Defendants.	)	

JUDGMENT

(Filed Nov. 24, 2004)

This action came on for trial before the court and a jury, Honorable Melodie Snell Conner presiding, and the issues having been duly tried and the jury having duly rendered its verdict on November 18, 2004,

It Is Ordered and Adjudged that:

1. Plaintiff Phyllis Brown, individually as surviving spouse of Derwin Brown, recover of defendants, jointly and severally, the sum of $250,108,398.00, with interest thereon at the rate of 12% as provided by law, and her costs of action.

2. Plaintiff Phyllis Brown, as the Executrix of the Estate of Derwin Brown, deceased, recover from defendants,

jointly and severally, the sum of $76,028,000.00, with interest thereon at the rate of 12% as provided by law, and her costs of action.

It Is Further Ordered and Adjudged, based on the jury's separate verdict on the punitive damages claim, that Plaintiff Phyllis Brown, as the Executrix of the Estate of Derwin Brown, deceased, recover of Defendants Sidney Dorsey, Patrick Cuffy and Paul Skyers, jointly and severally, the sum of $450,000.00 as punitive damages with interest thereon at the rate of 12% as provided by law, and her costs of action.

So ordered this 23rd day of November, 2004.

/s/ Melodie Snell Conner
Melodie Snell Conner, Judge
Superior Court of Gwinnett
County

(3)

No. 06-332

FILED

OCT 17 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

PHYLLIS BROWN,

Petitioner,

v.

DEKALB COUNTY, GEORGIA

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

REPLY TO BRIEF IN OPPOSITION

DAVID J. BEDERMAN
Counsel of Record
1301 Clifton Road
Atlanta, Georgia 30322-2770
(404) 727-6822

STEVEN K. LEIBEL
GEORGE P. SHINGLER
CASEY GILSON LEIBEL, P.C.
Of Counsel
Six Concourse Parkway
Atlanta, Georgia 30328
(770) 512-0300

Attorneys for Petitioner

REPLY TO BRIEF IN OPPOSITION

In its Brief in Opposition ["Op. Cert."], Respondent appears to question the legal, factual and pleading premises of the decision below, an opinion that it ostensibly endorses in counseling this Court to deny certiorari. Although Respondent does not challenge this case as an appropriate vehicle for resolving the issues raised, it does question whether there can be any real interplay between Eleventh Amendment "arm of the State" analysis and section 1983 officer status determinations.

1. Respondent questions whether this action was properly brought against Dorsey in his official capacity. See Op. Cert. (ii). At the time this suit was filed (in November 2002; see Op. Cert. Pet. 26a), it was unnecessary for plaintiffs, in order to gain section 1983 relief against Respondent, to sue Dorsey, and his minions, in their official capacity. After the Eleventh Circuit's rulings in *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), plaintiffs were given leave to amend their complaint to add an official capacity claim against the individual defendants. See Op. Cert. App. 28 (Amended Complaint, ¶ 3 (August 2003)). The state trial court understood the legal effect of this amendment, even as it ruled that the County would not be liable for Dorsey's and his deputies' conduct. See Pet. App. 19a ("The purpose of bringing suit against any of these individual Defendants in his official capacity is to establish DeKalb County's liability and to recover from DeKalb County."). So did the Georgia appeals court. See Pet. App. 4a & n.1.

2. Next, Respondent repeatedly observes that this case does not involve the Eleventh Amendment. Op. Cert. 8-9, 12-13. It is, of course, quite correct. Eleventh Amendment immunity cannot be directly implicated in a case brought, and maintained, in state court. But Respondent apparently misses

the point – not only of the ruling below (and other appeals court decisions), but also of this Court's jurisprudence – that determination of officer status, under section 1983, can be influenced by Eleventh Amendment "arm of the State" analysis.

As already noted, see Pet. 13, this Court's discussion in *McMillian v. Monroe County*, relied on such "arm of the State" idioms. See 520 U.S. 781, 786 (1997) (citing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997)); see also *Will v. Michigan Dep't State Police*, 491 58, 66-67 (1980). The court below, in relying on *McMillian*, was informed by this examination. See Pet. App. 12a-13a. More significantly, and despite Respondent's protestation, Op. Cert. 7, the Eleventh Circuit's "arm of the State" discussion in *Manders* was, indeed, relied upon by the Georgia courts in reaching the result that Georgia sheriffs are State officers. See Pet. App. 10a-11 n.23, 22a.

While Respondent asserts that this case has nothing to do with the Eleventh Amendment, courts have been routinely employing "arm of the State" reasoning in resolving §1983 officer status. The cases Petitioner earlier cited, Pet. 12-18, all involved the use of "arm of the State" factors in deciding whether a §1983 defendant was acting for the State, for purposes of liability under that provision. In the federal appeals courts, discussion of Eleventh Amendment immunity has not been generic or ancillary, merely owing to the fact that the case was being litigated in federal court, but, rather, closely connected to whether an official was a final policy-maker for the State in relation to the conduct leading to the suit. See, e.g., *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 221-25 (4th Cir. 2001); *Hudson v. City of New Orleans*, 174 F.3d 677, 681-82 (5th Cir. 1999); *Franklin v. Zaruba*, 150 F.3d 682, 684-85 (7th Cir. 1998); *Streit v. County of Los Angeles*, 236 F.3d 552, 566-67 (9th Cir. 2001); *Abusaid v. Hillsborough County Bd. of Comm'rs*, 405 F.3d 1298, 1310-13 (11th Cir. 2005).

And, as already noted, Pet. 18, the Eleventh Circuit's *Manders* decision expressly employed peculiar "arm of the State" idioms to characterize Georgia sheriffs as State officials in cases involving the use of force at county jails, even though the State fisc would not be chargeable for any judgment against a county sheriff. See 338 F.3d at 1309 n.9, 1324-25 (discussing *Hess*, *Regents*, and *Auer v. Robbins*, 519 U.S. 452 (1997)). The split in authority between various courts of appeal (federal and state) is real and palpable, and turns on the proper role that "arm of the State" factors (including the essential calculus of whether the State treasury is responsible for a judgment against an entity) should have in the §1983 officer status inquiry, aside and apart from the other factors mentioned by this Court in *McMillian*.

3. It is up to this Court to articulate a sensible basis for the overlay of "arm of the State" jurisprudence on §1983 officer liability. Petitioner is not seeking uniform outcomes, because such will, indeed, change from state to state, from officer to officer, and in regard to particular functions and activities giving rise to §1983 liability. It is not unreasonable, however, to seek a uniform standard, something which is manifestly absent from the decisional law in the decade following *McMillian*. And, despite Respondent's suggestion, Op. Cert. 4, it is not enough to utterly defer to state law characterizations of officer status, and to state court rulings on this subject. If taken literally, such would mean that this Court has no plenary authority to rule at all in these cases, a position that was roundly rejected in *McMillian*. See 520 U.S. at 786 (quoting *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997)).

There should be no doubt that, depending on which standard of section 1983 officer status is adopted here, the outcome of this case will most certainly be affected. Petitioner will be prepared to argue, see Pet. 23, that even under the *McMillian* factors, Georgia sheriffs are not State officers. The

constitutional and legal status of Georgia sheriffs, under Georgia law, is different from that of sheriffs in Alabama.[1] Among other things, Georgia sheriffs (unlike those in Alabama) are constitutionally declared to be county officials. GA. CONST. Art. IX, § 1, ¶ III(a). At least until the underlying decision here, in which Georgia's courts followed the lead of the Eleventh Circuit, Georgia case law was consistent in characterizing sheriffs as county officers. See *Truesdel v. Freeney*, 197 S.E. 783, 786 (Ga. 1938); see also *Manders*, 335 F.3d at 1354-56 (Barkett, Kravitch, Tjoflat, JJ, concurring) (collecting cases). Even if subject to some state-law regulation, such is not pervasive (in contrast to Alabama) and cannot convert Georgia sheriffs into State agents. See id. at 1357-64.

In addition to all of this, Petitioner is prepared to submit that if "arm of the State" analysis is overlaid here, and proper emphasis is given (as this Court has consistently held) to whether the State fisc is at risk of satisfying a judgment against a Georgia sheriff, then that would be conclusive in ruling that Georgia sheriffs are not State officers. And insofar as Georgia sheriffs are independent constitutional officers, it is improper to assume (as both the Eleventh Circuit and the Georgia appeals courts have done) that if they are not truly county officials, then they must be State agents. Petitioner has already noted a "third way" in the case law, see Pet. 19-23 (discussing *Franklin*, 150 F.3d at 1685; *Cash*, 242 F.3d at 226), which places the section 1983 officer status analysis on the proper footing: questioning whether the local official is really and effectively a State agent.

---

[1] Ironically, Alabama courts recognize the differences. See *Parker v. Amerson*, 519 So. 2d 442, 445 (Ala. 1987) ("Other states. . . have constitutions that expressly define sheriffs as 'county officers'.") (citing Georgia, Illinois, Tennessee, Florida, and New York constitutions).

4. Respondent notes that this Court has denied review in earlier cases raising the same issue here. Op. Cert. 5 n.13. Petitioner is mindful of this, but would submit that problems as to the fundamental basis of §1983 officer status, and the relevance of "arm of the State" factors, have festered long enough. All relevant lower courts (state and federal) have now ruled on the status of Georgia sheriffs. It should be time for this Court to articulate a sensible standard for making these status determinations, one that takes into account variations in the position of local officials between States, and also recognizes that not all powerful and autonomous local officers are *ipso facto* State agents.

CONCLUSION

The petition should be granted.

Respectfully submitted,

STEVEN K. LEIBEL
GEORGE P. SHINGLER
Casey Gilson Leibel, P.C.
Of Counsel
Six Concourse Parkway
Atlanta, Georgia 30328
(770) 512-0300

DAVID J. BEDERMAN
Counsel of Record
1301 Clifton Road
Atlanta, Georgia 30322-2770
(404) 727-6822

Attorneys for Petitioner

October 18, 2006